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OF
Cases Argued and Determined
IN
Ohio Common Pleas and
Superior Courts

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Editor of the Ohio Law Bulletin

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22 O. L. 132	666
29 O. L. 81	111
29 O. L. 252	665
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36 O. L. L. 222	430
37 O. L. L. 241	430
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52 O. L. 44, Sec. 78	401
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95 O. L. 312	401
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REPORTS
OF
Cases Argued and Determined
IN THE
Superior and Common Pleas Courts

STOCKHOLDER'S PRIVILEGE OF INSPECTION.

[Cuyahoga Common Pleas, December 18, 1912.]

FRANK P. WHITNEY v. AMERICAN SHIPBUILDING Co.

1. Privilege of Inspection is to Conserve Rights of Stockholder.

The statutory privilege to inspect books and records of a corporation belongs, primarily, to every stockholder, in his right of stockowner, and for the conservation of his property rights as such owner.

2. Petition to Enforce Privilege of Inspection need not Allege the Purpose of the Inspection.

In an action to enforce this privilege of inspection, an allegation of ownership of stock, demand for inspection, and refusal thereof, makes a *prima facie* case for judicial interposition without averment of the purpose, because the presumption is, that inspection is sought in good faith, and for a lawful purpose.

3. Showing of Bad Faith will Defeat the Application.

But if it be made to appear that the demand is made in bad faith, not to conserve the interests of the stockholder or of the corporation, the relief sought will be denied.

4. Answer Alleging Bad Faith is Proper Pleading.

In such action, allegations by the corporation of facts showing such bad faith are defensive and material, and will not be stricken from its answer.

[Syllabus by the court.]

INJUNCTION.

Thompson, Hine & Flory, for plaintiff.

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Hoyt, Dustin, Kelley, McKeehan & Andrews, for defendant:

Cited and commented upon by the following authorities:

Hale v. Henkel, 201 U. S. 44 [26 Sup. Ct. Rep. 370; 50 L. Ed. 652]; *Boyd v. United States*, 116 U. S. 616 [6 Sup. Ct. Rep. 524; 29 L. Ed. 746]; *Cromwell v. County of Sac*, 94 U. S. 351 [24 L. Ed. 195]; *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189 [56 N. E. Rep. 1033; 48 L. R. A. 732; 78 Am. St. Rep. 707]; *Herman*, Estoppel Sec. 111, p. 111; 23 Cyc. 1311, 1313; *Black*, Judgments p. 617; *Irish American Bank v. Ludlum*, 56 Minn. 317 [57 N. W. Rep. 927]; *Fuller v. Insurance Co.* 68 Conn. 55 [35 Atl. Rep. 766; 57 Am. St. Rep. 84]; *Russell v. Place*, 94 U. S. 608 [24 L. Ed. 214]; *Lyon v. Manufacturing Co.* 125 U. S. 698 [8 Sup. Ct. Rep. 1024; 31 L. Ed. 839]; *Caldwell v. Hill*, 17 Dec. 801; *Letts v. Kessler*, 54 Ohio St. 73 [42 N. E. Rep. 765; 40 L. R. A. 177]; *Woodworth v. Bank*, 154 Mich. 459 [117 N. W. Rep. 893]; *Mutter v. Railway*, 38 Ch. Div. 92; *Weihenmayer v. Bitner*, 88 Md. 325 [42 Atl. Rep. 245; 45 L. R. A. 446]; *State v. Lazarus*, 127 Mo. App. 401 [105 S. W. Rep. 780]; *O'Hara v. Biscuit Co.* 69 N. J. L. 198 [54 Atl. Rep. 241]; *Taylor v. Bank*, 117 App. Div. 348 [101 N. Y. Supp. 1039]; *Foster v. White*, 86 Ala. 467 [6 So. Rep. 88]; *Cobb v. Legarde*, 129 Ala. 488 [30 So. Rep. 326]; *Stone v. Kellogg*, 165 Ill. 192 [46 N. E. Rep. 222; 56 Am. St. Rep. 240]; *Meysenburg v. People*, 88 Ill. App. 328; *Legendre & Co. v. Brewing Assn.* 45 La. Ann. 669 [12 So. Rep. 837; 40 Am. St. Rep. 243]; *Commonwealth v. Railway*, 134 Pa. St. 237 [19 Atl. Rep. 629]; *State v. Brewing Co.* 21 Wash. 451 [58 Pac. Rep. 584; 47 L. R. A. 208]; *Clawson v. Clayton*, 33 Utah 266 [93 Pac. Rep. 729]; *Wright v. Hueblein*, 111 Md. 649 [75 Atl. Rep. 507]; *People v. Mines Co.* 122 App. Div. 617 [107 N. Y. Supp. 188]; *People v. Bank*, 122 App. Div. 635 [107 N. Y. Supp. 369]; *People v. Press Assn.* 133 N. Y. Supp. 216; *Henry v. Babcock*, 196 N. Y. 302 [89 N. E. Rep. 942; 134 Am. St. Rep. 835].

PHILLIPS, J.

General Code 8673 provides that "the books and records of a corporation, at all reasonable times, shall be open to the inspection of every stockholder."

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Under favor of this statute, plaintiff, a stockholder in the defendant company, brings this action for a mandatory injunction requiring defendant to permit him to inspect its records, books and papers.

Defendant answers that the attitude and purpose of plaintiff are inimical to the corporate interests and business of the defendant; that his demand for inspection is not made in good faith as a stockholder; that his purpose is to obtain information to be used in the prosecution of sundry actions now pending, and in actions yet to be brought, against this defendant, in which actions this plaintiff is interested adversely to this defendant; that said actions, and this demand for inspection, are parts of a conspiracy to injure defendant; and that the inspection demanded would be an abuse of the statutory privilege, and a wrong to all the stockholders of the defendant company.

Plaintiff moves to strike out parts of the answer because immaterial and not defensive. In support of the motion, it is claimed that the right of inspection by a stockholder is an absolute right, and is not affected by the purpose of the inspection or the motive of the demand. On the other hand, it is claimed that while the stockholder seeking the order of the court need not, in the first instance, assert the propriety of the inspection, or the good faith of the demand, the company may assert and show the want of propriety and good faith, to oppose the interposition of a court of equity.

To make way for intelligent and instructive study of the cases, which are many and conflicting, let us ascertain, if we can, the true meaning and application of the statute—bearing in mind as we proceed, that the language of a statute can have only one true meaning, however various the facts that may be subsumed in its application.

If we adopt what is called, in legal hermeneutics, close interpretation, and adhere to the literal sense of the words, it is clear that the language of the statute would subject the company to inspection by friend or foe, with or without a purpose, to satisfy idle curiosity, or with a malicious purpose to injure the company or some member if it.

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When literal interpretation leads to results so obviously at variance with any conceivable legislative intent, we must resort to what is known as extensive or liberal interpretation, and perhaps to construction, to find the legislative purpose, which must be our guide in the application of the legislative expression.

There is legislative purpose in every enactment, and it is the province of the court to discover and to carry out that purpose.

This statute, and like statutes in other states, confer the privilege of inspection upon "stockholders," and upon stockholders only. This shows the legislative purpose to be that stockholders shall exercise this privilege of inspection *qua* stockholders; that is, the stockholder is to exercise it in respect of his relation and status as stockholder. The term stockholder is not expansive; it is definite. It is not merely descriptive of the person who may make inspection; it is restrictive. Any other interpretation of the statute would rob it of legislative purpose, and leave the courts without any guide in its application.

If the legislative purpose were to authorize inspection out of idle curiosity, or to gain some personal advantage, or for purposes inimical to the corporate interests, there would be no reason for restricting the privilege to stockholders. It might, with equal reason and propriety, be conferred upon strangers, and upon business rivals. The legislative intent is not merely to expose the corporate records to inspection, and it is not merely to confer a favor upon the inquisitive stockholder.

The legislature never intended to authorize an offensive or vexatious espionage, to be exercised from motives of idle curiosity or for the promotion of evil and vicious purposes.

The object of the legislature was, to conserve the corporate interest of stockholders, one and all.

At common law, the stockholder's right of inspection was not an absolute right, to be exercised regardless of purpose or occasion, and was always enforced with caution, so as to prevent abuse. The application had to show a proper purpose, and then

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the order of the court restricted the inspection so as to subserve that purpose. The rule respected and conserved the rights of other stockholders, as well as the rights of the applicant. *Steinway, In re*, 159 N. Y. 250 [53 N. E. Rep. 1103; 45 L. R. A. 461]; 2 Barn. & Ad. 115.

In *Mitchell v. Rubber Co.* 24 Atl. Rep. 407 (N. J.), the court, considering the defense that the application was not in good faith, and holding that the purpose to promote his competing business did not show bad faith, adds: "Cases may often arise where his interests are very small, and however plain his legal rights may be, he only preserves them with some mischievous purpose. In such case, if the purpose be clearly established, the court would not lend its aid to its accomplishment."

This answer attacks not only the propriety and good faith of plaintiff's demand for inspection, it also challenges his status as a stockholder. It alleges that he purchased but one share of stock, not as an investment, and to become a stockholder in good faith, but to put himself in a position to circumvent and injure the corporation, and as part of a conspiracy to that end. Is such allegation, if true, material and defensive?

Id certum est, that one not a stockholder can not be entitled to inspection, under the statute. If he is only nominally a stockholder, having obtained a single share for the sole purpose of injuring the company, is he, with this odium attached to his ownership of stock, in any better position? Is the *locus standi* of such stockowner one that the statute is intended to protect? Does such false attitude, such false pretense, commend a suitor to a court of equity, which demands that suitors come in good faith and with clean hands? This part of the answer shows, that while the plaintiff comes to court in the guise of a stockholder, this attitude is only assumed *pro re nata*, and is really a disguise—that while the hand may be the hand of Esau, the voice is the voice of Jacob.

As matter of pleading, the averment that plaintiff is a stockholder is matter of inducement, essential to show the plaintiff's capacity to sue. Such averment, though matter of inducement, is an issuable averment. The parts of the answer sought

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to be stricken out are pleaded as a defense of new matter. The defendant, not denying that there is one share of stock registered in plaintiff's name, places this fact in juxtaposition with correlated facts, to show that, as part of the entire group of facts to which the fact of stockownership belongs, it does not clothe plaintiff with the capacity which it apparently does when segregated and standing alone. Phillips, Code Pl. 236. In this way, the parts of the answer asked to be stricken out are intended to show, and do tend to show, that plaintiff is not a stockholder of the defendant company within the purview of the statute authorizing inspection of records. It is not enough that plaintiff is a stockholder; he must be a stockholder within the meaning and purpose of the enabling statute—a distinction which, it seems to me, some of the courts have failed to make.

In practically all the courts of this country where such enabling statutes have been enforced, an allegation of the purpose of the inspection has not been required of the plaintiff. It is different where the inspection has been enforced as a common-law right, or where the statute expressly restricts the right. The reason for not requiring an allegation of the purpose in the first instance is, that the courts indulge the presumption that the inspection is sought in good faith and for a proper purpose. This is a rebuttable presumption, and the fact so presumed may be traversed as if it had been pleaded. This makes way for the kind of answer under consideration.

If the statements of this answer are true, the attitude of this plaintiff toward the defendant corporation, in the matter of the inspection of records, is that of an adversary. It does not follow from what has been said, that no information as to contents of records and papers can be had, notwithstanding the attitude be that of an adversary. But to do this—to obtain information for use as an adversary—resort must be had to the various means incident to judicial procedure. But the use of such incidents of litigation is limited to such privileges and such information as one may rightfully demand as an adversary. Resort to deception and pretense to obtain information from an adversary is not in harmony with the judicial motive.

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The question under consideration has been before the courts in a multitude of cases in other states; and some courts have held that the purpose of the stockholder—whether his application is made in good faith or in bad faith, can not be made the subject of judicial inquiry. These decisions are rested mainly upon the assumption that the privilege of inspection, unless qualified by the statute, is an absolute right, conferred without legislative reason or purpose. Most of these cases are not well considered, are wanting in the *ratio decidendi* which must characterize a sound decision, and they abound in *obiter dicta*.

For example, I refer to the case of *Weihenmayer v. Bitner*, 88 Md. 325 [42 Atl. Rep. 245; 45 L. R. A. 446], cited in support of this motion. The answer alleged that the plaintiff was a rival of the defendant in business, and sought inspection to obtain information to be used in his business, to the injury of the corporation. The replication denied this purpose, and the court says, "no proof whatever was offered" upon this issue.

This eliminated that issue, and the propriety and effect of such answer was not before the trial court, or the reviewing court. But the court adds this *dictum*: "But the petitioner's right would not be forfeited by any such cause. The right is given to him as a stockholder by statute, and is absolute and not made to depend upon any circumstance but the ownership of stock." And the court then adds: "It is easy to see that there might be good reasons for refusing an application; for instance, if it were made for some evil, improper or unlawful purpose. And if such purpose were alleged and proved, the writ would be denied."

If these *dicta* were to be treated as authority, they would show only that while there are improper purposes justifying the refusal of inspection, the promotion of a rival business is not one of them.

A judgment for the corporation was reversed, on the sole ground that the trial court refused to instruct the jury that upon the facts admitted in the pleadings the verdict should be for the plaintiff. The decision is not an authority in this case,

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though a dictum in the opinion seems to favor the contention of the defendant here.

Johnson v. Langdon, 135 Cal. 624 [67 Pac. Rep. 1050; 87 Am. St. Rep. 156], presented this question in precisely the way in which it is here presented. The petition did not state the purpose of the inspection. A demurrer to the petition was overruled. The corporation answered that the purpose of the applicant was to injure the corporation, by obtaining information to be used by rival corporations in which plaintiff was a stockholder. On motion, these averments were stricken out; and this action of the trial court was affirmed by the Supreme Court, holding that "it is no defense to allege that the objects and purposes of the inspection are improper, and that the petitioner desires to injure the business of the corporation. The clear legal right given by the statute can not be defeated by inquiry into motives."

Yet, in the opinion the court says: "It may be conceded that cases may arise in which a small stockholder, largely interested in some other corporation, desires the information for improper purposes. But we can not presume such purpose or motive, nor can we allow it as a defense to an application for a writ of mandamus. We must presume that the owner of part of the stock of a corporation is interested in its welfare and prosperity; that he desires to know the condition of its business affairs for the same reason that any prudent business man would desire to know the condition and management of his private affairs."

With apology to the supreme court of California, I suggest that it is idle to talk of a presumption of good faith, when the contrary has been alleged, and the allegation has been stricken out.

The contrary decisions are greater in number, are better considered, and rest, as it seems to me, upon authoritative reason and sound principle. As a typical case, I refer to *Lyon v. Screw Co.* 16 R. I. 472 [17 Atl. Rep. 61], where it was held that the right of inspection is not an absolute right, and is not to be enforced unless some reasonable purpose is to be subserved.

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The court said: "The power of the court should be exercised in such cases with great discrimination and care; and while stockholders should be carefully protected from any abuse on the part of the corporation, or unjust denial of their rights, so, on the other hand, courts should guard against all attempts, by combinations hostile to the corporation or its officers, to use its writ to accomplish their personal or speculative ends." The application was refused.

The rule, as settled by the weight of authority, both in this country and in England, is concisely stated by the supreme court of Washington, in the syllabus of *State v. Brewing & M. Co.* 21 Wash. 451 [58 Pac. Rep. 584; 47 L. R. A. 208], as follows:

"A stockholder of a corporation has the right, at reasonable times, to inspect and examine the books and records of such corporation, so long as his purpose is to inform himself, in the interests of the corporation, as to the manner and fidelity with which the corporate affairs are being conducted; and, upon refusal to permit such inspection, may enforce the right by mandamus proceedings."

"The presumption, when a stockholder applies for inspection of the corporate books and accounts, is that the inspection is sought in the interest of the corporation; and when the refusal is based on the ground that the inspection is sought for purposes antagonistic to the corporation, the burden is upon the officers refusing inspection to establish that the stockholder is not proceeding in good faith."

The case of *Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189 [56 N. E. Rep. 1033; 48 L. R. A. 732; 78 Am. St. Rep. 707], is relied on as settling the law for Ohio that the motive of the stockholder in seeking an inspection of records is not a proper subject for judicial investigation. This case has been cited by courts of this state and of other states, as so deciding. A dictum in the opinion does so state, but such is not the doctrine of the case.

The authority of a decision is found, not in the language of the opinion, nor of the syllabus, nor in the judgment pro-

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nounced, but in the doctrine of the case, the reason of the decision, the *ratio decidendi*. It is found in the proposition of law necessarily involved in the decision; and the proposition of law necessarily involved is one without which the case could not be decided as it was decided. The jurisdiction of the court is restricted to the decision of such proposition, and its decision is not a precedent for anything beyond this. *State v. Baughman*, 38 Ohio St. 455, 459.

Professor Wombaugh, in his book on the Study of Cases, says: "The first key to the discovery of the doctrine of a case is found in the principle that the court making the decision has no authority to decide any case except the case actually presented."

A decision becomes a precedent, therefore, only upon such points of law as are actually decided, and only upon such of these as are necessarily decided. All else is dictum, whether found in the opinion or in the syllabus.

In the Hoffmeister case, the petition alleged the plaintiff's ownership of stock, his demand for inspection, and the company's refusal. It did not allege the purpose of the inspection. The corporation demurred to the petition, and the demurrer was overruled. The corporation then answered, alleging various facts showing the bad faith of the plaintiff. The plaintiff traversed these averments of bad faith, by a reply. Upon these issues the trial court found for the plaintiff. That is, the court found that the averments of fact showing bad faith were not proved. Judgment was entered enjoining the defendant from preventing an inspection. This finding of fact eliminated all possible question as to the legal sufficiency of the answer, and rested the judgment solely upon the legal sufficiency of the petition. No question was made by the reviewing court as to the legal sufficiency of the answer, and none could be made, because its averments had been found to be untrue in fact. The Supreme Court could not have decided that the answer was not defensive, because that question was not involved in the record, and the court did not have jurisdiction of it.

It is clear, from an examination of the case, that the court did not decide, and did not undertake to decide, as to the legal

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sufficiency of the answer. The syllabus shows that the doctrine of the case is restricted to the requisites, and the sufficiency, of the petition. It is in these words:

"The right to inspect does not depend upon the motive or purpose of the stockholder in demanding such inspection; and a petition which shows that the plaintiff is a stockholder, that he has requested the defendant to allow him to inspect the books and records of the corporation, and fix a reasonable time for the same, which request has been refused, states a cause of action."

The opinion does contain this dictum:

"We are of the opinion that where a suitor demands the enforcement of a clear right given him by law, whether the remedy be legal or equitable, his motive for such action is not a proper subject for judicial investigation."

Immediately following is this:

"The petition stated a cause of action, and if supported by the evidence, warranted the granting of equitable relief."

The mischief of this dictum, and of the decisions in line with it, is that it gives dominance to the legal right of one stockholder, and loses sight of the rights of others, and of the corporation charged with the protection of all the stockholders alike, and encourages all sorts of deviltry by a would-be-mischief-maker, and makes the court subservient to schemes to injure and annoy, for the sole purpose of inflicting a wrong. And again, it is a mistaken view to call the statutory privilege a right; it is only a privilege conferred as a means of protecting a property-right; and to uphold the exercise of the privilege when the sole purpose is malevolent, is not the protection of any right, and does not accord with the judicial motive.

In *Caldwell v. Hill*, 17 Dec. 801, the superior court of Cincinnati followed the Hoffmeister case, having misconceived the doctrine of that case.

The decision of our circuit court, affirming the judgment of Judge Vickery in an earlier stage of this case, holds only that the statutory privilege of inspection applies as well to foreign

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corporations doing business in this state as to domestic corporations. It does not relate to the question now involved.

Nearly every court that has considered this privilege of the stockholder has said or intimated that there is a limit to its rightful exercise, and that the courts are not without power to prevent an abuse of the privilege. The trend of the authoritative decisions, and of much of the dicta, is to the effect that when the stockholder exercises his privilege of inspection he stands in a fiduciary relation toward the corporation and other stockholders, and that the courts will not aid him if his purpose be to violate his trust.

I find that there is no authoritative decision in Ohio upon the question under consideration. The question being *res nova* in Ohio, I adopt what seems to me the doctrine best fortified by reason and authority both in this country and in England, which is both reasonable and fair, and which protects the rights of all, and gives undue advantage to none, and I overrule this motion.

JUDGMENTS—PLEADINGS.

[Hancock Common Pleas, January Term, 1911.]

ILLINOIS NATIONAL SUPPLY CO. v. GEO. W. WHITMAN ET AL.

1. Misunderstanding between Attorney and Client as to Filing Answer not "Unavoidable Casualty or Misfortune" Justifying Vacation of Default Judgment after Term.

A misunderstanding between attorney and client as to whether the former is retained to file an answer and defend a lawsuit for the other, by reason of which no answer is filed and judgment follows by default, is not such "unavoidable casualty or misfortune," within the meaning of Par. 7 of R. S. 5354 (Gen. Code 11631) for which such judgment may be vacated after term.

2. Defense of Noncompliance by Foreign Corporation Regarding Filing Certificate must be Raised by Answer.

In an action brought by a foreign corporation, it is not necessary that the petition aver compliance with the provisions of R. S. 148-C (Gen. Code 11631) requiring the filing of a certificate

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with the secretary of state as a condition to its right to do business in this state. Any question based on noncompliance by the corporation with this statute must be raised by answer. It does not go to the jurisdiction of the court and is too late after judgment.

[Syllabus by the court.]

DEMURRER to petition to vacate.

Taber, Longbrake & O'Leary, for plaintiff.

John Sheridan, for defendant.

DUNCAN, J.

This is a case on petition to vacate judgment after term. The judgment was for the sum of \$914.35 and was rendered by default at the February term, 1910. The defendant, Tripplehorn, who complains of the judgment, claims he was prevented from defending the suit by "unavoidable misfortune" in that he was served with summons in the action just as he was about to depart for the state of Oklahoma on important business which he could not defer without great loss, and that he left the matter with his attorney, and "as he thinks," with instructions to prepare and file an answer for him, but that through some misunderstanding on the part of his attorney, the same was not done. That ignorant of such matters, he relied upon his attorney and thought the case would come up for trial at the next September term, until August 12, 1910, when he was advised of the judgment. He further says he has a good defense to said action and he tenders an answer setting up a good defense. He also says that this judgment is void for the reason that the plaintiff, an Illinois corporation, at the time said judgment was rendered, had not complied with the laws of Ohio governing foreign corporations and was not authorized to do business or maintain any action in this state.

The case is submitted upon a general demurrer to this petition. Conceding these facts to be true, therefore, is the defendant entitled to have said judgment vacated?

In solving this question, we start out with the proposition that the court has discretionary control of its judgments during the term at which they are rendered, but that this control ends with the term. *Huntington v. Finch*, 3 Ohio St. 445.

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In many of the states, this power is discretionary after as well as during the term. In some, by decision of the courts, where there is no statute on the subject. In others, because a discretionary power is given by statute. In Ohio, the power is given and controlled by statute, Gen. Code 11631. Said section so far as it relates to the matter here under discussion, reads as follows: "The common pleas court, or the circuit court, may vacate or modify its own judgment or order, after the term at which the same was made: * * *

"7. For unavoidable casualty or misfortune, preventing the party from prosecuting or defending."

In this state after judgment term, as in this case, the court has no discretion in the matter. The power of the court to vacate its judgments after the term is governed by settled principles as applied to the statute, to which the courts must conform and their action thereon is a final order subject to review and reversal, the same as any other order or judgment. *Huntington v. Finch, supra*; *Hettrick v. Wilson*, 12 Ohio St. 136 [80 Am. Dec. 337]; *Braden v. Hoffman*, 46 Ohio St. 639 [22 N. E. Rep. 930]; *Van Ingen v. Berger*, 82 Ohio St. 255, 259 [92 N. E. Rep. 433; 19 Ann. Cas. 799]. So that, the question here is one of absolute right. *Exposition Bldg. & L. Co. v. Spiegel*, 4 Circ. Dec. 474 (12 R. 761); *Cincinnati v. Railway*, 56 Ohio St. 675 [47 N. E. Rep. 560]; *Interstate Life Assur. Co. v. Raper*, 78 Ohio St. 113 [84 N. E. Rep. 754].

"Unavoidable misfortune," is one of the grounds provided by said Gen. Code 11631 upon which a judgment may be vacated after term, so the question to be determined is whether the facts plead make a case within this provision. In the state of Kansas where this same ground is provided for the vacation of judgments it is held that it must be "so stated as to make it appear that no reasonable or proper diligence or care could have prevented the trial or judgment; that is, that the party complaining is not himself guilty of any laches." *Hill v. Williams*, 6 Kan. 17. And so it was held by the district court of Cuyahoga county, Ohio, that the complainant must clearly show, first, that he was without negligence himself or by his attorney; second,

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that he exercised due diligence in making or attempting his defense; and third, that he was prevented by unavoidable casualty. *Fliedner v. Rockefeller*, 9 Circ. Dec. 266 (12 Bull. 20). Also in *Clark v. Ewing*, 93 Ill. 572. That the negligence of the attorney is negligence of his client is also held in *Gordon v. Cowle*, 4 Dec. Re. 92 (1 Clev. L. Rep. 18); *Clark v. Delorac*, 7 Dec. Re. 325 (2 Bull. 113). And this seems to be the great weight of authority in the absence of collusion or fraud upon the part of the attorney in permitting judgment to be entered against his client. *Eggleston v. Trust Co.* 205 Ill. 170 [68 N. E. Rep. 709]; *Moore v. Horner*, 146 Ind. 287 [45 N. E. Rep. 341]; *Hedrich v. Smith*, 137 Ia. 625 [115 N. W. Rep. 226]; *Andres v. Schlueter*, 140 Ia. 389 [118 N. W. Rep. 429]; *Welch v. Mastin*, 98 Mo. App. 273 [71 S. W. Rep. 1090]; *Butler v. Morse*, 66 N. H. 429 [23 Atl. Rep. 90]; *Phillips v. Collier*, 87 Ga. 66 [13 S. E. Rep. 260], and other cases.

It is also held that a judgment taken against a defendant by default upon service made at his residence without his knowledge while he was absent from the state cannot be set aside for unavoidable casualty though it prevents him from making a defense, the court saying, "there may be casualty or misfortune where all the facts are known, as well as where they are not. I cannot but think that this provision was intended to apply, in a case where, some accidental injury or sickness, etc., has intervened to prevent a defense, rather than a want of knowledge of the service of a summons, arising from the cause stated." *Howard v. Abbey*, 2 Dec. Re. 64 (1 W. L. M. 278). In *Clark v. Delorac*, *supra*, the record showed that the defendant had been in default for answer for six or eight months and that the case, being one for damages, was tried before a jury in December, 1874, resulting in a verdict against him. His petition to vacate the judgment set forth that from November, 1874, to January, 1876, he was confined to his bed by sickness, and was not aware that his case had been tried; that on the same day the verdict was rendered a motion for new trial was filed by his attorney, on the ground that the damages were excessive, etc. The following Saturday the motion was called and continued, and on

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the next Saturday, the last day of the term, it was again called, and not being answered by the attorney, judgment was entered on the verdict. On said day, however, the attorney sent a boy to the courthouse to inquire of the clerk whether motions would be heard that day, and he was informed there would be no court held, and upon that information the attorney made no appearance. Court, however, was held and the motion disposed of as stated. "The only unavoidable casualty or misfortune which the court could discover was the incorrect information received by the attorney through his messenger. There was no casualty or misfortune which prevented the filing of an answer for six or eight months; nor does the petition show any unavoidable casualty or misfortune which prevented the attorney from being present at the trial. So that, the only misfortune was the attorney acting on incorrect information. A judgment is too serious a matter to be set aside for the mere convenience of an attorney." In *Clark v. Ewing, supra*, the attorney was sick, and had applied for an extension of time, and in his application stated that the pleas in said cases were peculiar and nobody could draw them but himself, and he could not explain by letter so that another could draw them. Leave for pleading was extended till the third Monday of July, at which time no pleas were in, nor was the party, or any one representing him present, and thereupon judgments were taken by default. The attorney had been sick, it appears, and confined to his room for more than four months previous to his death, which occurred two weeks after the judgment. The court on page 577, says:

"Parties litigant and their counsel must be presumed to know the rules of court and it is their duty to comply with them; and if they do not, they must take the consequences. Such rules are instituted for the general good, and it is the duty of the courts to enforce them; otherwise it would be useless to adopt them. If the general health of an attorney breaks down, he should notify his clients of the fact, so they can take such steps as may be necessary for their protection."

I only state the facts in these cases to show how strict the rule is. The plaintiff has a judgment. To vacate it, is to in-

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terfere with a substantial right, and this must not be done without good and sufficient grounds within the meaning of this statute as here discussed. Now, the record shows that the petition in this case was filed November 11, 1909, that personal service was had upon this defendant on the same day and that judgment was not taken against him until March 16, 1910, and that he did not learn of said judgment until August 12. In the meantime it does not appear where he was, that his attorney knew his whereabouts or that he gave or attempted to give his case any attention whatsoever. His "unavoidable misfortune," as stated, was the misunderstanding on the part of his attorney as to whether he was employed. No doubt this was unfortunate, but was it an unavoidable misfortune? Webster defines "unavoidable" as not avoidable; incapable of being shunned or prevented; inevitable; necessary. Now, assuming as I must, that complainant and his attorney can read, write and speak the English language and are as intelligent as people ordinarily and able to understand, it occurs to me that the complainant must have been so loose and uncertain in his language and conduct in his attempt to employ counsel, or that his attorney was so inattentive and heedless of what was being said to him, or there would have been no misunderstanding. If the result of the effort made to employ counsel in a matter of such importance was that neither knew the mind of the other, the only explanation to be made is that one or both failed to exercise ordinary care in the premises.

In the face of the strictness of the rule already explained, it was the complainant's duty to use unmistakable terms in the employment of counsel and not be sidetracked by any uncertain response to the end that a judgment of more than \$900 would not be rendered against him in three weeks for the want of an answer, and if he did not, he certainly had no reason to complain because a judgment was rendered against him by default after more than four months' notice. If the defendant was not to blame in this behalf, his attorney was, and as we have seen, the negligence of the attorney being the negligence of the client,

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this furnishes no ground for relief. I therefore hold that the alleged misunderstanding between the attorney and client as to whether the former was retained is not such unavoidable casualty or misfortune as contemplated by said section for which this judgment may be vacated.

The defendant further urges as a ground for the vacation of this judgment that the plaintiff is a foreign corporation and that at the time the judgment was rendered it had not complied with the laws of Ohio governing foreign corporations, and for that reason was not authorized to do business or maintain any action in this state. The statute which makes the requirements and authorizes a certificate of compliance therewith is Gen. Code 183 and it will be noticed that only "foreign corporations incorporated for purposes of profit * * * doing business in this state and owning or using a part or all of their capital or plant in this state" are subject to the provisions of this section. Neither the petition to vacate nor the answer tendered describe the plaintiff corporation as one of the kind required to qualify under this statute. This is necessary. To take advantage of this law as a defense to an action brought by a foreign corporation, the averments of the answer must bring such foreign corporation plainly, fully and squarely within its provisions and show that such foreign corporation does not belong to the class of foreign corporations exempted from its provisions. *Toledo Commercial Co. v. Manufacturing Co.* 5 Circ. Dec. 131 (11 R. 153); *Automatic Heating Co. v. Schlemmer Co.* 18 Dec. 788 (6 O. L. R. 72).

The statute provides that foreign corporations entirely nonresident may make sales in this state by correspondence or by traveling salesmen, without complying with its provisions. The sales upon which this suit is founded were made by another corporation against which there is no complaint, and the claim therefor was assigned by it to the plaintiff company. This is enough, but the question sought to be made here could only operate as a defense in any event. It was waived by failure to answer. It does not affect the jurisdiction of the court.

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Brady v. Supply Co. 64 Ohio St. 267 [60 N. E. Rep. 218; 83 Am. St. Rep. 753].

Holding these views, it follows that the demurrer to the petition to vacate must be sustained.

INTOXICATING LIQUORS—LANDLORD AND TENANT.

[Franklin Common Pleas, November 4, 1910.]

STATE OF OHIO V. DOROTHY REESE ET AL.

DEFENSE OF WANT OF KNOWLEDGE BY LANDLORD OF UNLAWFUL SALE OF LIQUOR MUST BE UNEQUIVOCAL TO BE VALID.

The defense by landlord of want of knowledge of unlawful use of intoxicating liquor upon leased premises is not available in an action to recover the penalty prescribed by Gen. Code 6195 unless it presents facts which tend to show unequivocally want of knowledge of such unlawful use.

[Syllabus approved by the court.]

C. T. Clark, for plaintiff.

Thomas & Hays, for defendants.

KINKEAD, J.

This is an action to recover the penalty prescribed by Gen. Code 6195 for the unlawful sale of intoxicating liquor in houses of ill fame. The question arises upon a demurrer to the second defense of the defendant, Binder, who in his answer alleges that as the owner of the property, he had no knowledge whatever of the use of the portion of his premises for the purposes of prostitution, and that he did not know that liquor was sold therein. It appears from the pleading that the lower part of the building was used for storeroom purposes and the upper part for living purposes, the defendant claiming that he did not rent the property for such purposes, and had no knowledge.

It is claimed by counsel for the plaintiff that want of knowledge is not a valid defense in actions of this character because the statute provides that a judgment rendered against any person violating the provisions of this law "shall be a lien upon the building in which such liquor is sold or given away,

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and upon the lot or tract of land upon which such building or place is situated." It will be noticed that there is nothing in the statute with reference to either knowledge or want of knowledge on the part of the owner of the use of the property by the tenant.

I am cited to two cases, one, *Simpson v. Serviss*, 2 Circ. Dec. 246 (3 R. 433), decided by the circuit court of this county, Stewart, Shauck and Shirer, JJ., in 1888. The other is the case of *State v. Somerville*, 3 Dec. 205 (1 N. P. 422), decided in 1895 by Pugh, J. And also the opinion of Rogers, J., of this court in respect to the same question in this same case on a demurrer to the petition.

The circuit court case was an action by a property owner directed against the auditor of the county in respect to the penalty which was placed upon the duplicate. The law involved in that case, 83 O. L. 157, providing against the evils resulting from the traffic in intoxicating liquors, was held by the court to attach to the real property on and in which the business of said traffic is conducted by a lessee, although the same is so conducted without the knowledge or consent of the lessor or owner of the premises, and in violation of the conditions of the lease.

The Somerville case was brought under the same law which is now under consideration. The question arose both in that case and in this case before Judge Rogers upon a demurrer to the petition for the reason that it did not aver want of knowledge. The ruling in each case was that the demurrer was not well taken because such want of knowledge did not have to be alleged in the petition in the first instance. Both Judge Rogers and Judge Pugh expressed the opinion that if the owner proves that he did not know the house was used for the purposes of prostitution, it would be a good defense. These expressions of opinion must be regarded as *dictum*. They were not facing the problem as we are now in this case.

The circuit court, however, in the case above cited, must necessarily have passed upon the question of the effect of want of knowledge on the part of the property owner of the fact

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that liquor was being sold in his property, because it was specifically alleged that he did not know nor could he ascertain that liquors were being sold there, although he made frequent inquiry and diligent inspection of the premises, and although the lease which he made provided that no intoxicating liquor should be sold on the demised premises. The purpose of this law is very plain, and it is wholly different from almost any other liquor law in our statutes. The rule as stated by Judge Pugh is quite institutional that all kinds of property were held by the owners thereof subject to the implied obligations that its use was not to be injurious to the community, and the police power of the state is ample to prohibit or punish the persons who permit their property to be so used to the detriment of the health, morals or safety of the people. This law is contemplated to impose a penalty upon persons who deliberately rent their property for such purposes. I cannot bring myself to believe, however, that if an honest case were presented by a property owner, where he, in good faith, did not knowingly rent his property for such purposes and did not know that liquor was sold therein contrary to law, and that he was diligent during the occupancy of the property to obtain information in respect to such use and sale of liquor, that the penalty could be constitutionally imposed upon him in such case.

The circuit court decision was under the Dow law which, it must be conceded, was materially different from the case of a person who, in good faith, may rent his property of the nature involved in this case to any one for dwelling house purposes only, and who, in good faith, may not know and never learned that the same was being used for purposes of prostitution and that liquor was being sold therein.

I would be inclined to overrule a demurrer where the defense in all of its terms and conditions squarely presented this kind of a situation. But inasmuch as the second defense in this answer avers that this property was placed in the hands of the Sims rental agency, who rented the property, I am inclined to think that the defense taken as a whole does not

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present facts which tend to show unequivocally want of knowledge of the condition. Whatever Sims did or whatever his knowledge was in respect to such property would be binding upon the defendant, Binder.

For these reasons the demurrer will be sustained.

Leave will be granted the defendant to amend within rule.

MUNICIPAL CORPORATIONS.

[Hamilton Common Pleas, April 20, 1912.]

CINCINNATI (CITY) v. HENRY M. WAITE ET AL.

Auditor's Certificate not Required in Expenditures for the Elimination of Grade Crossings.

The restriction of Gen. Code 3806, requiring a city auditor's certificate as to funds in municipal treasury to meet a proposed expenditure, applies primarily to expenditures derived from the general revenue producing powers of the municipality; hence such certificate is not necessary in case a specific power is conferred upon the corporation for a specific purpose with a specific provision for payment of the expenditure involved in the exercise of such power as in a case for the elimination of grade crossings under Gen. Code 8871-8892.

DEMURRER to answer.

Alfred Bettman, city solicitor, for plaintiff.

Maxwell & Ramsey, for defendant.

HUNT, J.

Under the act of May 2, 1902 (95 O. L. 356), now in amended form, Gen. Code 8871-8892, counsel for the city of Cincinnati commenced proceedings for the abolishment of the crossing at grade of the Pittsburgh, Cincinnati & St. Louis Railway Company over Eastern avenue, known as Rookwood crossing, and in such proceedings by ordinance No. 836, passed April 17, 1905, agreed with the railway company as to the plans, etc., of such improvement, and as to the payment by the city and the railroad company of the cost thereof.

For various reasons the work has been delayed, but the railway company still claims the right to proceed under such ordi-

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nance. In pursuance of such ordinance, the railway company has made certain expenditures for which in pursuance of said ordinance it has presented a claim to the city, which it is alleged the city, through its proper officers, is about to approve and pay.

The city solicitor in the petition herein asks that the city be enjoined from making such payments, upon the ground that the ordinance is void, because the auditor did not make the certificate provided for by R. S. 2702 (Gen. Code 3806), that the necessary funds were in the treasury applicable to such purpose, further alleging that there were no such funds in the treasury at the time of the passage of the ordinance, although since that time such funds have been provided by a bond issue.

The defendant, the Pittsburgh, Cincinnati & St. Louis Railway Company, answers admitting the want of the certificate of the auditor, but sets up all that it has done under such ordinance, the cause of delay, and the further fact that in an action brought by the city solicitor in the superior court of Cincinnati, the validity of the ordinance was attacked upon other grounds than want of such auditor's certificate, in which action this defendant answered, and the court upon the final hearing of said case dismissed plaintiff's petition.

The petition and answer herein are lengthy, but the real issues raised by plaintiff's demurrer to defendant's answer as argued to the court, are, first, whether the certificate of the auditor, as to the existence of the necessary funds, was necessary to the validity of the ordinance; secondly, whether the judgment of the superior court dismissing the action brought in such court, was a final adjudication of the validity of the ordinance.

Without reviewing all the cases wherein the question of the necessity of the auditor's certificate has been considered, it is sufficient to say that the inapplicability of Gen. Code 3806, requiring such certificate, is fully established by the application to the grade crossing act of the principles upon which the following cases have been decided: *Akron v. Dobson*, 81 Ohio St. 66, 78 [90 N. E. Rep. 123]; *Emmert v. Elyria*, 74 Ohio St. 185, 195 [78 N. E. Rep. 269]; *Smith v. Evans*, 74 Ohio St. 17, 22 [77 N. E. Rep. 280]; *Comstock v. Nelsonville*, 61 Ohio St.

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288 [56 N. E. Rep. 15]; *Cincinnati v. Holmes*, 56 Ohio St. 104 [46 N. E. Rep. 514]; *Pansing v. Miamisburg*, 31 O. C. C. 130 (11 N. S. 511), affirmed, no op., *Pansing v. Miamisburg*, 79 Ohio St. 430; *Kohler Brick Co. v. Toledo*, 29 O. C. C. 599, 609 (10 N. S. 137); *Trowbridge v. Hudson*, 24 O. C. C. 76, 77 (3 N. S. 644); *Cincinnati v. Honningfort*, 1 Dec. 563, 566 (32 Bull. 32); *Conneaut v. Straus*, 21 Dec. 87 (11 N. S. 277); *Defiance Water Co. v. Defiance*, 12 O. F. D. 299 [90 Fed. Rep. 753]; *Cincinnati v. Cincinnati*, 5 Cir. Dec. 372 (11 R. 309); *Kerr v. Bellefontaine*, 59 Ohio St. 446, 463 [52 N. E. Rep. 1024].

The principles underlying such decisions seem to be that Gen. Code 3806, requiring the certificate of the auditor that the necessary money be in the treasury to the credit of the proper fund, is inapplicable when the city is required or permitted to do an act in furtherance of a specific purpose involving the expenditure of money, and the statutory proceedings provided for the accomplishment of such purpose do not reasonably contemplate the necessary money being in the treasury before the creation of any liability of the city therefor, because the amount of the expenditures can not be and is therefore not contemplated to be determined in advance; or because such expenditures are to be distributed over periods of time, during each of which periods the necessary money is to be raised by the exercise of power specifically given therefor; or because specific statutory provision is made for the raising of the necessary money to pay the accruing liability independent of the general revenue producing powers of the city, the theory being that a specific power given for a specific purpose with a specific provision for the payment of the expenditures involved in the exercise of such power, can be exercised without the hoarding in advance by the city of money for such expenditures, even though such expenditures might be estimated definitely before any irrevocable action by the municipality in the accomplishment of such purpose, and that Gen. Code 3806 is primarily applicable only to expenditures to be paid from the general revenue producing powers of the city.

Having decided that noncompliance with Gen. Code 3806

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does not invalidate the ordinance under consideration, it is unnecessary to determine the effect of the judgment of the superior court upon such ordinance if Gen. Code 3806 was applicable thereto; and it is unnecessary to determine whether or not the cause of action in the superior court and in the present case is the same, or if not the same, whether the issues actually raised in such action are the same, nor to distinguish judgments founded upon admissions of law or fact, actual, implied or constructive, from judgments upon actual issues.

The demurrer of the city to the answer of the defendant is therefore overruled.

INTOXICATING LIQUORS—PLEADING.

[Licking Common Pleas, January Term, 1911.]

CAROLINE BINGMAN ET AL. V. JOHN FILKER.

Lease of Premises for Saloon Purposes cannot be Pleaded as Defense to Action by Landlord for Payment of Liquor Tax.

In attachment, brought by a landlord to recover indemnity for money paid as Aiken tax, an allegation of the answer that the property on which the intoxicating liquors were sold was leased by the defendant from the plaintiff is immaterial and on motion will be stricken out.

Kibler & Montgomery, for plaintiffs.

Smythe & Smythe, for defendant.

SEWARD, J. (Orally.)

This is a suit to recover indemnity, as surety, against the payment of the Aiken tax.

Bingman brings suit against Filker, alleging that Filker occupied premises belonging to Bingman on first street in this city; that the premises were put upon the tax duplicate by the auditor under authority from the auditor of state, for the payment of the Aiken tax. This tax is made a lien on the property, and, plaintiff seeks, by attachment proceedings, to secure some of the property of the defendant to indemnify him against having to pay the tax, which is levied upon the plaintiffs' property by the auditor who has put it on the tax duplicate, by au-

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thority of that section of the statute which makes the tax a lien upon the premises where intoxicating liquors are sold.

The person primarily liable is Filker, who occupied the premises for a saloon. He sets up that he rented the premises from Bingman, and occupied it as a saloon—I believe he says “for sale of intoxicating liquors”; and that Bingman was to furnish him the beer.

A motion is made to strike out of the answer this clause:

“Further answering this defendant says that he became the tenant of said plaintiffs in said real estate on October 8, 1906, under a written lease therefor which contained the provision that said lessee was permitted to transact a saloon business upon said premises, and in which it was agreed that the said lessee should sell exclusively keg beer made by the Korzenborn Brewing Company, which said the Korzenhorn Brewing Company was owned and conducted by the plaintiffs herein. That during all of the time defendant occupied said premises as the tenant of said plaintiffs, it was understood and agreed between them that he was to conduct therein the business of selling and trafficking in intoxicating liquors; and that during all of said time said business was so carried on by the defendant herein with the full knowledge and approval of said plaintiffs; and during all of said time said plaintiffs knowingly rented said premises to said defendant for said purpose, and during all of said time received from him the agreed rental for the conducting of said business therein; and that said rental was fixed and based upon the fact that such business was to be conducted therein.”

Now, suppose that that is all true; that Filker was primarily liable for this tax—that he did lease the property from Bingman for the sale of intoxicating liquors—that could not affect his liability for the tax to the county auditor, and could not make Bingman liable for it even if he did rent it from Bingman. The court thinks that matter—as to his liability to Bingman—is entirely immaterial, and the motion to strike that out is sustained.

Herbst v. Conners.

MECHANICS' LIENS.

[Montgomery Common Pleas, May 31, 1911.]

EDWARD HERBST V. W. J. CONNERS ET AL.

1. Filing One Lien for All of Several Buildings Erected on Several Lots not Contiguous is not Sufficient.

Filing of one mechanic's lien for all of several buildings erected on different lots is not sufficient under Gen. Code 8308 unless the lots upon which they stand are contiguous.

2. Petition to Foreclose Lien Should State Nature of Contract and Contiguity of Lots.

In foreclosure of a mechanic's lien, the petition should be definite as to whether the work was performed under a general contract and also as to whether or not the lots upon which the building or buildings stand are contiguous.

DEMURRER to petition.

James Knight and Flatau & Lindsey, for plaintiff.

Thomas & Bronson, for Equitable Sav. & L. Assn.

MARTIN, J.

In this case there has been a demurrer filed to the second cause of action. The second cause of action in this case sets forth facts showing that a mechanic's lien has been filed on certain lots, and on these facts set forth in said second cause of action plaintiff asks for foreclosure of said lien. This demurrer is based upon the ground that where there is more than one building erected on lots which are not contiguous a mechanic's lien should be filed for each and every building upon the lots upon which such buildings are erected. Gen. Code 8308 of Ohio provides for the filing of a lien upon any building and the land upon which said building may stand for the work or labor of erecting, altering, repairing, or moving said building. In other words, the lien shall extend to no other land except the land upon which the house or structure stands which is erected. Gen. Code 8311 provides that when the improvement consists of two or more buildings united together upon the same lot or

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contiguous lots, or of several buildings upon contiguous lots, but erected under one general contract, it shall not be necessary to file a separate lien upon each building for the work done. This section was evidently passed for the purpose of modifying the former section, which provided that the lien could only be placed upon the land upon which the building was erected and no other land. So that the law is very clear that when more than one building is erected upon different lots, those lots must be contiguous if but one lien is to be filed for all the buildings.

In the second cause of action it appears that there were a number of houses and buildings erected for the defendant, Conners. It also appears in the same cause of action that the numbers given to the lots are not consecutive. In other words, judging by the customary way in which lots are numbered there must have been nine lots between lot number 34 and lot number 44. But the fact that they are attempting to foreclose the lien on these lots, and that they aver that the contract was for more than one building, and that the lots are not consecutively numbered, does not necessarily mean that they are seeking to foreclose on more than one building or that the lots are not contiguous, but it does create an inference amounting almost to such a presumption, and although the court does not feel that it would be justified in sustaining this demurrer as a demurrer, it feels it should sustain the same as a motion to make said second cause of action more definite and certain, so as to bring it more clearly under the modification set forth in Gen. Code 8311 as to being a general contract and as to whether or not the lots are contiguous.

The demurrer will be sustained as a motion to make more definite and certain.

Shimmel v. Cole.

DEEDS—EVIDENCE.

[Licking Common Pleas, April Term, 1911.]

ISAIAH SHIMMEL v. NEBIT H. COLE ET AL.

Deed not Set Aside for Misrepresentation as to Land Conveyed in Case of Doubt of Representations Made.

A deed will not be set aside because of misrepresentation and deceit as to the character of the land conveyed, there being a conflict of testimony and the court left in some doubt as to the nature of the representations which were made to the grantee.

S. L. James and Flory & Flory, for plaintiff.

Norpell, Norpell & Martin, for defendants.

SEWARD, J. (Orally.)

This case, submitted to the court upon the pleadings and the evidence, involves a controversy growing out of the trading of a certain lot in this city by Shimmel to Cole for 320 acres of land situated in Michigan. The suit is to cancel a deed and annul the contract that was entered into between these parties. The contract was a verbal one, but was executed by the transfer of the title by deeds from the various parties.

Cole owns 640 acres of land in Michigan. He sold 320 acres off of the south part of the section—one-half of the section to Mrs. Hicky. He moved to this city and got into relation with Shimmel in some way. Mrs. Hicky had arranged with Cole to take Shimmel with him to Michigan and show him her land. He took Shimmel up there and showed him the land of Mrs. Hicky. On a part of that land was some timber. It was pointed out to Shimmel, who claims that Cole told him that his land was covered all over with that kind of timber, that there were fifty acres of white pine and about eighty acres of tamarack and that it was covered all over with valuable timber—merchantable timber. It is said that the term “merchantable timber” was used. Shimmel said that he expressed a desire to see the timber, and that Cole said: “It won’t do for you to go in there, you will get lost.” He wanted him to take him in there and Cole said it was so dense that he would get lost, and Shimmel said he pointed out to him certain lands and claims,

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and that he deeded to him other lands than those that he pointed out to him, and that there was no timber on it of any consequence. And his boys testify to that, and his wife—that there was no timber on the land that was deeded to him—that the timber was not of any consequence. One of the witnesses for the plaintiff, Mr. Rinehart, was called by the plaintiff, and he said that the land was pretty well timbered. He said that on cross-examination; that there was a large amount of tamarack and some other kinds on it. Shimmel and his boys testify that there was no timber on it, and I believe his wife also—that there wasn't any timber on it at all—not of any consequence—nothing that would be considered as timber. But Rinehart says that it is very heavily timbered with tamarack timber, such as is used for telegraph and telephone poles; that it is very heavy and dense; at the northeast corner of it—that there were some eighty acres covered with tamarack timber. Cole says that he took Shimmel all over that land; that he started in at the north line of Mrs. Hicky's land and went north until they came to this tamarack timber—within two hundred yards of the north line of the land, and that he offered to show him the west line of it and he said no, that he was satisfied; that he didn't care to go any further over it; that he was satisfied with it and would make the deal. They came home here and visited back and forth. Shimmel claims that the first proposition was to sell the land. At any rate, they finally reached the conclusion that they would trade and trade even, a lot in West Newark for the land in Michigan, 320 acres.

The court is not satisfied that Shimmel was not taken over this land. The court is not satisfied that Cole did not show him the land conveyed by the deed. Before the court could set aside the deed and the transfer and restore the parties to the original holdings of their land, the court must be satisfied to a tolerable degree of certainty. But the evidence is not clear and convincing. There is a great conflict in the testimony of these parties. The court is in doubt as to which is right about it. The court is rather inclined to the opinion that Cole showed Shimmel the land that he conveyed to him, and that his version of what he did when he was up there is correct. Shimmel says

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that he did not convey to him the land he showed him, but he does not point out to the court how he reaches that conclusion. It is said that the creek runs through that land, and the state road. Cole says he took him on one side of the creek and that they also went over on the other side of it. I am inclined to believe Cole's version of it. Someone is telling an untruth, but it is difficult for the court to tell which one it is. The court must be satisfied to a reasonable certainty by the testimony and the court has not been so satisfied. There may be a decree entered for the defendant.

TAXATION.

[Franklin Common Pleas, November 25, 1911.]

STATE EX REL. WITHWORTH BROS. CO. v. DITTEY ET AL.

Proceedings of the Ohio Tax Commission Subject to Inspection.

The proceedings of the tax commission of Ohio by virtue of act 102 O. L. 224 (Gen. Code 1465-4) constitute a public record, and subject to proper regulations these records are open to inspection by any and all persons who choose to examine them, regardless of their interest or lack of interest in the subject matter.

MANDAMUS.

T. E. Powell, for plaintiff.

T. S. Hogan, Atty., Gen., for defendant.

RATHMELL, J.

The relator prays for a writ of mandamus on the board of tax commission of Ohio to examine the records and reports of corporations.

The petition alleges that said board is a public board and as such has possession and control of the records and reports of all corporations doing business in the state; that these are public records, and examination of them by relator has been refused; that the purpose of the examination is for information in the publication of a business directory pertaining to corporations.

Defendants have filed a general demurrer to the petition. It is contended the relator has not shown such an interest as

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brings him within the common law rule, and that the absence of a statute giving such a right, and the provision of the law governing the commission denies him the privilege.

The common law rule contended for by defendants—that the right to inspect public records is confined to those who have an interest in the subject-matter to which the record relates—is not a general rule, and has not only been denied as obtaining in this country, *Burton v. Tuite*, 78 Mich. 363 [44 N. W. Rep. 282; 7 L. R. A. 73], but its application limited. And it pretty generally is held that subject to proper regulations and restrictions the public records are open to the inspection of any and all persons who choose to examine them, regardless of whether or not they have any definite interest in the subject-matter thereof. 24 Enc. Law p. 183.

There is good authority it seems that where a person is by law or by authority of law required to make a report or return of his acts or a statement of facts, that such is a public record of such acts or facts. 24 Enc. Law 174; *Iroquois (Bd. of Supr.) v. Keady*, 34 Ill. 297.

The law governing the tax commission requires a sworn statement of certain officers constituting the reports sought to be inspected. The same law makes the record of the proceedings of the commission a public record. Sec. 4, 102 O. L. 224.

We are of opinion that the maxim urged by defendants does not apply so as to necessarily imply that these reports are not public records. It places beyond dispute that the record of proceedings of the commission is a public record. The reports are not robbed of their public character under the other rule cited in the absence of an express exclusion by the statute.

We are unable to discover any special secrecy as to the reports on the part of the commission revealed in the statute; or any very good reason for withholding inspection in view of the claim that for years similar reports have been treated as public records when made to the auditor of state. We are of opinion that the pleading on its face makes a showing of a right to examination prayed for and that the demurrer is not well taken, and same is overruled.

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INJUNCTION—TAXES.

[Hamilton Common Pleas, ———, 1912.]

CINCINNATI, NEWPORT & COVINGTON RY. v. ROBERT B. EDMONDSON, AUD.

1. Tax Commission Act does not Divest County Auditors of Power to Correct Tax Records against Public Utilities Made Before July 1, 1910, Excepting Telegraph and Express Companies.

The act of May 10, 1910, 101 O. L. 399, creating the Tax Commission of Ohio and transferring to it certain powers as to taxing public utilities, not telegraph or express companies, formerly exercised by county auditors, prior to July 1, 1910, the time prescribed by it for its becoming operative, operates prospectively, not retrospectively. Since Sec. 74 of the act (Gen. Code 5518) limits the powers of such commission to the correction of its own records, and Sec. 115 (Gen. Code 5542-17) does not confer any power on the commissioner, the act does not divest county auditors of the powers to correct or make additions to records made by them prior to the passage of the act and before the appointment and qualification of the tax commission.

2. Taxpayer Enjoining Assessment of Tax Additions Cannot Complain of Additions Made During Operation of Injunction Set Aside because Wrongfully Granted.

Plaintiff having secured a temporary injunction restraining a county auditor from correcting his duplicate and placing certain tax additions thereon, cannot take advantage of the fact that such correction and additions were made after the restraining order was granted, where the court has set aside such order because wrongfully allowed.

[Syllabus approved by the court.]

INJUNCTION.

CUSHING, J.

This action is brought by the Cincinnati, Newport and Covington Railway Company to enjoin (Robert B. Edmondson and William A. Hopkins) the auditor and treasurer of Hamilton county from levying and proceeding to collect certain taxes which the defendants claim are due and owing from the plaintiff of Hamilton county, and which at the time of the issuing of the temporary order herein the defendants were proceeding to enforce and collect.

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The record presents a number of questions; first, that sufficient notice was not given plaintiff of the auditor's intention to correct, by making additions to, the tax duplicate; second, that the plaintiff had secured a temporary restraining order against the auditor, restraining him from placing said taxes on the duplicate, and that the duplicate was corrected in violation of the injunction; third, that the assessment was made by the prosecuting attorney and not by the auditor; fourth, that there was not sufficient evidence of the value of the property before the auditor at the time of making the corrections of the duplicate; and fifth, that the auditor was without jurisdiction to correct the tax duplicate of Hamilton county, and that the power to make such correction or addition to the tax duplicate of Hamilton county was vested in the tax commission of Ohio after July 1, 1910, it being admitted that the addition in question was made December 31, 1910.

The contention of plaintiff as to notice, that the prosecuting attorney made the assessment, and that the auditor did not have sufficient evidence of the value of the property at the time of making the corrections on the duplicate, is not sustained by the evidence; therefore, the plaintiff's contention must fail on these grounds.

As to the contention of counsel for plaintiff that the auditor made the correction in his duplicate in violation of an injunction, it seems to me on the most obvious principles of law that this contention must fail.

The court prior to 12 o'clock noon of the day on which the correction was made, set aside its temporary order theretofore granted, and in so doing held that it had incorrectly made the order. The testimony on the trial of this case disclosed that the temporary order was set aside by the court some time between seven and fifteen minutes prior to 12 o'clock of that day; also, that a clerk in the auditor's office under instructions from the auditor, had, possibly, five to ten minutes prior to that time, placed the assessments on the tax duplicate.

If the order was wrongfully obtained, as the court found it was, the plaintiff cannot take advantage of its own wrong in

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securing a temporary order and afterwards seeking to hold as void any act done in violation of that order. This principle, it seems to me, is so well settled that it is not necessary to discuss it or cite authorities.

A determination of the points stated leaves for consideration the question of the jurisdiction of the auditor to make the additions to the plaintiff's taxes that were made by him on December 31, 1910.

On May 10, 1910, the legislature of Ohio passed the Tax Commission act, 101 O. L. 399, by which certain powers theretofore exercised by county auditors were transferred to and vested in the tax commission of Ohio.

The sections of the act now under consideration are:

"Section 72. Between the first and fifteenth days of January in the year 1911, and within the same time of each year thereafter, a statement shall be delivered to the commission, in such form as the commission may prescribe, by each public utility, as defined in this act, other than express, telegraph and telephone companies, with respect to such utility's plant or plants, and all property owned or operated, or both, by it wholly or in part within this state. Such statement shall be signed and sworn to under the oath of the person constituting such public utility, if a person, or under the oath of the president, secretary, treasurer, superintendent or principal accounting officer or person of such firm, association or corporation, if a firm, association or corporation; and such statement shall contain: etc."

"Section 73. Between the fifteenth day of January and the fifteenth day of May of each year, the commission shall ascertain and assess at its true value in money all the property in this state of each such public utility, subject to the provisions of this act, other than express, telegraph and telephone companies."

"Section 74. The commission shall give notice to each public utility referred to in the last preceding section thereof, ten days before such property will be assessed of the time and place where such value will be ascertained. Before the assess-

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ment of said property, each of said public utilities shall have the right, upon written application, to appear before the commission and be heard in the matter of the valuation of its said property for taxation. After the assessment of the property of any such public utility for taxation by the commission, and before the certification by it of the apportioned value to the county, or to the several counties as herein provided, the commission may, on the application of any such public utility or any person interested therein, or on its own motion, correct the assessment or valuation of its property, in such manner as will, in its judgment, make the valuation thereof just and equal. The commission shall have and may exercise all the powers possessed by county auditors under Secs. 5390, 5397, 5399, 5400, 5401, 5402 and 5403 of the General Code, and all such public utilities shall be subject to all the provisions and penalties of said sections. The commission shall deduct from the total value of the property of each of said public utilities in Ohio, as assessed by it, the value of the real or personal property owned by said public utilities, if any there be, otherwise valued and assessed for taxation in Ohio, and shall justly and equitably equalize the relative values thereof."

"Section 76. The commission shall within twenty days after the valuation of any such public utility has been determined make a certified copy of its findings in full with reference to each public utility and forward the same to the county auditor, in each county, having any property of the said companies within his county. Such county auditor shall record the same in a book to be kept for that purpose, which said book and the certified copy of such findings shall be open to public inspection during all business hours. The county auditor shall place the apportioned value on the tax duplicate and taxes shall be levied and collected thereon, in the same manner and at the same rate as other personal property in the taxing district in question."

"Section 115. All powers, duties and privileges imposed and conferred upon any state board, which board is by this act abolished or its powers and duties in whole or in part conferred

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upon this commission, or any power or duty which has heretofore been conferred upon any state or county officer or board, which power and duty is hereby conferred upon the commission, is hereby imposed and conferred upon the commission created by this act; provided, that the powers and duties so transferred by this act shall continue to be exercised under existing laws until such time as the commission hereby created has been appointed and qualified. * * *

“Section 123. That said original sections 258, 5415 to 5431 inclusive, 5445 to 5542 inclusive and 5602 to 5617 inclusive, of the General Code, be and the same are hereby repealed. This act shall in no manner affect existing causes of action or pending actions, proceedings or prosecutions. This act shall take effect and be in force on and after July 1st, 1910, but the commission may be appointed and organize before said date as provided in sections one to ten inclusive of this act.”

The said act took effect July 1, 1910. The commission was appointed and qualified June 27, 1910. And, as stated, the additions in question were made December 31, 1910. The question presented is, did the auditor have authority to make the additions to the tax duplicate in Hamilton county for the years in question on December 31, 1910, or was that power vested in the tax commission of Ohio? The question presented stated in legal phraseology is, did the legislature by enacting the Tax Commission act, intend that the tax commission should act retrospectively and prospectively, or prospectively only? With reference to express, telegraph and telephone companies the powers granted to boards of county auditors and to other boards were expressly repealed, and there can be no question but that all matters of taxes theretofore vested in such boards was by the act transferred to said tax commission; also that their records were transferred at the organization of the board on June 27, 1910, and turned over to the tax commission.

It is well settled by the courts of this country that statutes shall be construed as having prospective effect only unless it clearly appears from the statute itself that it was the intention of the legislature that they should act retrospectively.

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In this case it is contended that the language of the statute giving the commission all the powers theretofore exercised by county auditors, meant that they should have those powers from the first day of July, 1910, and therefore the auditors of the several counties were deprived of making additions to or corrections of their duplicates with reference to public utility corporations. This language, according to the plaintiff, should be given a retrospective effect, that is, because the commission was vested with powers theretofore exercised by county auditors it means that that power should be exercised over the records of county auditors that were in existence prior to July 1, 1910. This, it seems to me, would be reading into the law something that is not therein expressed. Courts have no power in construing the law to read into or take from the law a syllable, word, sentence or clause. It must construe the language used by the legislature.

If the law is given prospective effect only, the construction then would be that after the commission had made a record of public utility companies for taxation, that the commission would have the same powers that had theretofore been exercised by county auditors in correcting its record or making additions thereto.

That part of Sec. 74 of the act giving the commission the power possessed by county auditors must be read in connection with the entire section. The first part of Sec. 74 provides for "Notice of Assessment." The second part defines the "Power of the Commission" as follows:

"After the assessment of the property of any such public utility for taxation by the commission, and before the certification by it of the apportioned value to the county, or to the several counties as herein provided, the commission may, on the application of any such public utility or any person interested therein, or on its own motion, correct the assessment or valuation of its property, in such manner as will, in its judgment, make the valuation thereof just and equal. The commission shall have and may exercise all the powers possessed by county auditors under Sec. 5390, etc., * * * and all such public

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utilities shall be subject to all the provisions and penalties of said sections."

The construction of this section, for which plaintiff contends, is that the sentence, "The commission shall have and may exercise all the powers possessed by county auditors, etc.," vests in the commission the power to make corrections of county auditors' duplicates after July 1, 1910, and that such auditors were by the act divested of any power over their records for the years in question. This sentence should be read in connection with the preceding sentence on the same branch of the subject, viz.: "After the assessment of the property of any such public utility for taxation by the commission," etc.

The rule of construction is that, "the language of a statute is its most natural expositor, and where its language is susceptible of a sensible interpretation, it is not to be controlled by any extraneous considerations."

It would seem therefore that the legislative intent was that after the commission had assessed a public utility for taxation it should have and could exercise all the power, in case of its own records, possessed by county auditors. This construction renders the language of the entire section clear, definite and consistent.

It is further contended by counsel for plaintiff that the following sentence from Sec. 115 of the act controls Sec. 74, and divests county auditors of all power over their own records after July 1, 1910.

"Section 115. All powers, duties and privileges imposed and conferred upon any state board, which board is by this act abolished or its powers and duties in whole or in part conferred upon this commission, or any power or duty which has heretofore been conferred upon any state or county officer or board, which power and duty is hereby conferred upon the commission, is hereby imposed and conferred upon the commission created by this act; provided, that the powers and duties so transferred by this act shall continue to be exercised under existing laws until such time as the commission hereby created has been appointed and qualified. * * *

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It is clear that Sec. 74 limits the power of the commission to a correction of its own records and does not confer any authority on the commission to make corrections in or additions to the records of the various county auditors in the state prior to January, 1911. Sec. 115 does not confer any power on the commission. The most that could be claimed for the section is that it divests boards and state and county officers of a power theretofore exercised by them. If this construction is given Sec. 115, there would be a gap of six months wherein no board, officer or commission would have power over matters of taxation in connection with public utilities. The legislature will be presumed to have enacted laws for the public good. Such would not be the case if the contention of plaintiff is the law. If my view of the law is correct, viz.: that the grant of power is limited by Sec. 74 to a correction of the commission's records, and their records could not be made until after January 1, 1911, then Sec. 115 must be held to apply to the making and correcting of records by the commission, and it does not divest county auditors of their power to correct, or make additions to records made by them prior to the appointment and qualification of the said tax commission. This view seems to be strengthened by the language of Sec. 123:

"This act shall in no manner affect existing causes of action or pending actions, proceedings or prosecutions."

If Secs. 74 and 115 are inconsistent, as they evidently are, Sec. 74 must prevail over Sec. 115.

"Where the first clause of a section of an act of the legislature conforms to the obvious policy and intent of the legislators, as elsewhere indicated in the act, it is not rendered inoperative and void by a later inconsistent clause which does not conform to this policy and intent. In such cases the latter clause is nugatory and must be disregarded." *McCormick v. West Duluth*, 47 Minn. 272 [50 N. W. Rep. 128].

If the proper return for taxes was not made by the plaintiff for the years claimed, there existed a cause of action against the plaintiff. The statute is specific as to existing causes of action.

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The Supreme Court of Illinois in passing upon the question of statutes having a retrospective effect or retroactive operation in a case where the law was changed with reference to judgments affecting real estate, say:

"There is nothing in either of said statutes indicating they were intended to have a retroactive operation, or were to apply to judgments which had already become liens upon real estate under prior laws. The language all refers to the future. Retrospective laws are not looked upon with favor. Statutes are usually construed as operating on cases which come into existence after the statutes are passed, unless a retrospective effect is clearly intended. (Citing cases.) In the latter case it was said that, 'although the words of the statute are broad enough, in their literal extent, to comprehend existing cases, they must yet be construed as applicable only to cases that may thereafter arise unless a contrary intention is unequivocally expressed therein.'

"So it may be said in reference to the act of May 26, 1897, that there is nothing in its language indicating that it was to have a retroactive operation, and prevent actions on contracts previously made, or for the enforcement and protection of vested rights. The terms of the act, construed in accordance with the rules of construction above announced, apply to the future, and not to the past." *Richardson v. Mortgage Tr. Co.* 194 Ill. 259 [62 N. E. Rep. 606].

In the case of *Jimison v. Adams County*, 130 Ill. 560 [22 N. E. Rep. 829], facts stated at page 563, the court says:

"It is a general rule that a statute will be construed to be prospective, and not retroactive in its operation, unless it clearly appears that the legislature intended it to have a retrospective effect. In the absence of a clear manifestation of such legislative intent, statutes will be construed as not to prejudice or affect past transactions." (Citing *Thompson v. Alexander*, 11 Ill. 54; *Conway v. Cable*, 37 Ill. 82; *Knight v. Begole*, 56 Ill. 122; *Tuller, In re*, 79 Ill. 99).

The Supreme Court of Virginia in passing upon the same question, say:

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"The principle of law is well settled, that although the words of a statute are broad enough in their literal extent to comprehend existing cases, they must be construed as applicable only to cases that may thereafter arise, unless a contrary intention is unequivocally expressed therein." *Campbell v. Fire Brick Co.* 75 Va. 291.

The same court in another case uses this language:

"The general principle deduced from these authorities is, that no statute is to have a retrospect beyond the time of its commencement; and this principle is of such obvious convenience and justice that it must always be adhered to unless in cases where there is something on the face of the statute putting it beyond doubt that the legislature meant it to operate retrospectively. And although the words of the statute may be broad enough in their literal extent to comprehend existing cases they must yet be construed as applicable only to cases that may thereafter arise, unless a contrary intention is unequivocally expressed therein." *Crigler v. Alexander*, 74 Va. (33 Gratt.) 677.

The same question was considered by the Supreme Court of Mississippi:

"It is not sufficient that certain words of the statutes may justify the application of the language. The language must be imperative; in other words, we must be able to say that it admits of no other construction." *Green v. Anderson*, 39 Miss. 363.

The Supreme Court of Minnesota says:

"Laws are not to be construed retrospectively, or to have a retrospective effect, unless it shall clearly appear that it was so intended by the enacting body, and unless such construction is absolutely necessary to give meaning to the language used." *Brown v. Hughes*, 89 Minn. 150 [94 N. W. Rep. 438].

The Supreme Court of Ohio used this language with reference to acts of this character:

"We are now as we were then, unable to find anything, in the act to indicate that the legislature intended the provisions of the act to become effective at a time other than that declared.

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The different dates could not have resulted from inadvertence." *State v. Ronoy*, 82 Ohio St. 376 [82 N. E. Rep. 486].

We cite without quoting the case of *State v. Dirckx*, 211 Mo. 569 [111 S. W. Rep. 1]. Numerous other cases have been examined and could be cited. They are collected under *Sutherland*, Stat. Constr. Secs. 641, 642, 643, and are all to the same effect.

The weight of authority therefore is that a statute is to be construed as having a prospective effect, unless the language clearly and expressly states that it shall have a retrospective effect.

The question then is presented as to whether or not the legislature intended that the tax commission should correct or make additions to the duplicates of the auditors of all the counties of the state after July 1, 1910, or whether it should have and exercise all the power theretofore exercised by county auditors.

There is no provision in the act requiring the auditors of the various counties to report to the tax commission of the state the duplicate for the year 1911 and prior to that time. The tax commission would have no knowledge of such duplicate, and while the commission is given authority to investigate, the time in which such investigation could be made was so short that it is evidence that the legislature intended that the powers given to the tax commission of Ohio should operate only with reference to its own record and only with reference to returns made under the law in question.

The duplicate of the auditor of Hamilton county was made prior to June 27, 1910, and was of a date prior to the passage of the tax commission.

Therefore, the temporary order heretofore granted will be dissolved and plaintiff's petition dismissed at its costs.

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MUNICIPAL CORPORATIONS—POLICE.

[Cuyahoga Common Pleas Court, 1911.]

STATE EX REL. FINDING V. FRED KOHLER ET AL.

1. POWER OF DIRECTOR OF PUBLIC SAFETY TO TRY AND PUNISH POLICEMAN SUSPENDED BY THE CHIEF OF POLICE CANNOT BE DELEGATED TO SUCH CHIEF.

The director of public safety, being the executive head of the police and fire departments under Gen. Code 4368 and required by Gen. Code 4380 to inquire into the cause of suspension of a policeman by the chief of police upon certification of such fact by the latter pursuant to Gen. Code 4379, the power of trial and right to punish a policeman is exclusive in such director and cannot by him be conferred on another.

2. CHIEF OF POLICE IS WITHOUT AUTHORITY TO IMPOSE PENALTY OF NO PAY UPON SUSPENSION OF OFFICER TO ENFORCE DISCIPLINE.

A chief of police under Gen. Code 4379, giving him the "exclusive right to suspend" a policeman in the interests of discipline and for incompetence, has no right to try and no power to punish therefor; hence, an order by the chief suspending an officer for a designated period without pay, while not such suspension as entitles such officer to a peremptory writ requiring certification to the director of public safety under Gen. Code 4380, yet the penalty imposed of "no pay" is without legal authority and void.

MANDAMUS.

F. F. Gentsch, for plaintiff.

N. D. Baker, city solicitor, for defendants.

ESTEP, J.

The plaintiff in his petition claims that he is a member of the police force of the city of Cleveland; that on January 27, 1911, the defendant Fred Kohler, as chief of the police force of the city of Cleveland, without warrant of law and in violation of the mandatory provisions of Gen. Code 4379 and 4380 of Ohio, usurped the power to try the relator and render final judgment against him for violations of certain alleged rules of the police department. It is further claimed that, in pursuance of said usurpation of power, the said Fred Kohler, chief of police as aforesaid, suspended the relator from duty without pay, and fined him his next three vacation days; that the said

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Kohler refused to comply with the provisions of Gen. Code 4380, as amended in 101 O. L. 291, which required him to certify the fact of such suspension, with the cause therefor, to the director of public safety of the city of Cleveland, who, within five days from the receipt thereof, is enjoined to inquire into the cause of such suspension by the said chief of police.

The petition, after further recitals, sets out that the action of the said Kohler, in undertaking to try the relator on charges and rendering final judgment therein, was void and of no legal effect; and the plaintiff prays for a peremptory writ of mandamus to issue to the said Kohler, requiring him to forthwith certify to the director of public safety of the city of Cleveland, in writing, the cause of such suspension, and until the further order of this court the said Kohler, John Vanok, H. L. Davis and Hy D. Wright, as chief of police, secretary of the police department, city treasurer, and city auditor, respectively, be restrained from deducting any amount of the pay due relator as an officer of the police department of the city of Cleveland, and for such other relief as may be proper in the premises.

At the time of the filing of the petition an alternative writ of mandamus was issued and a restraining order was granted as prayed for. The writ was made returnable on February 6, 1911.

The defendant, Kohler, filed his answer herein, and after admitting that he temporarily suspended the relator for eight days without pay, and that the pay of relator would amount to proximately \$24, and that the defendants would deduct this amount from relator's pay, denies each and every other allegation contained in the petition.

The defendant says, that in temporarily suspending the said relator without pay, he acted under rule 12 of the rules formulated and adopted by the director of public safety providing for the regulation and discipline of the police department. He says that, pursuant to said rule, he punished said relator for a breach of discipline of said department, committed by said relator, of a minor character; that he examined into said breach of discipline and imposed the penalty set out in the petition, but denies that he suspended relator, and did not find him guilty

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of such a breach of discipline as required his suspension and certificate for trial in the mode and manner prescribed by the statutes.

A hearing was had upon the pleadings, and the questions of law arising therefrom were argued to the court.

No evidence was introduced tending to show the nature of the charges preferred against the relator, and upon which he was tried and punished by the chief.

It is contended by the defendant, Kohler, that the relator was not suspended as provided by Gen. Code 4379. It is admitted, however, that the relator was temporarily suspended for eight days without pay.

The real question presented under the pleadings is, whether or not the chief of police, under the law, has the right to try and punish any police officer for any cause.

The law prior to the enactment of Gen. Code 4368, as now contained in the General Code, constituted the chief of police the executive head of the police department. Gen. Code 4368, above referred to, provides that, under the direction of the mayor, the director of public safety shall be the executive head of the police and fire departments. It further provides that he shall have all powers and duties connected with and incident to the appointment, regulation and government of these departments, except as otherwise provided by law.

Gen. Code 4379 provides that the chief of the police department shall have the exclusive right to suspend any of the deputies, officers or employes in his department, and under his management and control, for incompetence, gross neglect of duty, gross immorality, habitual drunkenness, failure to obey orders given him by the proper authority, or for *any other reasonable and just cause*.

Gen. Code 4380, as amended in 101 O. L. 297, provides, that if any such employe is suspended as provided in Gen. Code 4379, the chief of police, forthwith in writing, shall certify such fact, together with the cause for such suspension, to the director of public safety, who, within five days from the receipt thereof, shall proceed to inquire into the cause of such suspension and render judgment thereon; which judgment, if the charge be

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sustained, may be either suspension, reduction in rank, or dismissal from the department; and such judgment shall be final except as otherwise provided in this subdivision.

In order to have a thorough and complete investigation, this section further provides that the director of public safety shall have the power to administer oaths and to secure the attendance of witnesses and the production of books and papers.

Gen. Code 4505, as amended in 101 O. L. 297, gives the right to any person, reduced in rank or dismissed from the department by the director of public safety, to appeal from the decision of such officer to the civil service commission, where such proceedings shall be had as are provided in said section.

It will be observed, from what I have stated, that the director of public safety, being the executive head of the police department, is given full power to try any police officer for incompetency, gross neglect of duty, gross immorality, habitual drunkenness, failure to obey orders given by the proper authority, or for *any other reasonable and just cause*. This last ground would seem to cover any breach of discipline or infraction of the rules of the department.

It will also be observed that, in order that a full and complete trial of charges may be had, the director of public safety is invested with the power to administer oaths, and to secure the attendance of witnesses and the production of books and papers.

The defendant, however, claims that, under Gen. Code 4382, the director of public safety having conferred upon him the power to make all rules for the regulation and discipline of the department, has among other rules, established rule 12, which is set forth in the answer of the defendant, Kohler. This rule provides that if the chief does not suspend an officer or patrolman as provided by Gen. Code 4379, he may impose a fine not exceeding \$25, or the loss of a certain stipulated number of days' pay, in amount not exceeding \$25, or deprive of furlough or vacation days, or suspend temporarily from duty, or reprimand any of said officers or patrolmen for all the things mentioned in Gen. Code 4379, with the additional cause, to wit, "for the violation of any rule of the department," which in

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my opinion is fully covered by the last clause in Gen. Code 4379, which provides for charges based on "any other or reasonable and just cause."

The authority of the chief of police, in so far as the statutes confer authority upon him, is as follows:

Gen. Code 4372 provides that the chief of police shall have the exclusive control of the stationing and transfer of all patrolmen and other officers and employes in the department, under such general rules and regulations as the director of public safety prescribes.

Gen. Code 4372, in giving him control of the conduct of officers and patrolmen under him, provides, as I have already stated, that he has the exclusive right to suspend for the causes therein specified; and the following section provides for the certification of such suspension by him to the director of public safety for trial, etc.

Nowhere in the statutes have I been able to find any provision investing the chief of police with the power to try and punish officers or employes in the police department.

This power is fully given by the legislature to the director of public safety. This power being one of a *quasi*-judicial nature, and requiring in its exercise discretion and judgment, I think it will not be seriously contended that he can confer it on another. *Kelly v. Cincinnati*, 9 Dec. 611 (7 N. P. 361); 23 Enc. Law 365, and cases cited.

While Gen. Code 4382 gives the director of public safety the right to make all rules for the regulation and discipline of the departments, it does not provide that the chief of police shall try those who violate the rules. The plain inference would be, in my opinion, that the executive head of the department would try all offenders, the violation, however, being brought to him by the chief of police, after he has exercised his exclusive authority of suspension.

I am, therefore, of the opinion that rule 12, in so far as it undertakes to give the chief of police the power to punish police officers for the causes therein mentioned, is invalid, for the reasons that: (1) The power of trial and the right to punish is exclusively given to the director of public safety.

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(2) The director of public safety has no right to confer that power upon another.

I am in hearty accord with the belief that the chief of police should, to a certain extent, be clothed with the power to try and punish patrolmen for breaches of discipline of a minor character. I am of the opinion that a strict discipline is essential to the welfare of the department. The legislature, however, has seen fit to make the director of public safety the executive head of the department, and has clothed him with full authority to try all offenders for the offenses enumerated in Gen. Code 4379, which also includes "any other reasonable and just cause." The chief of police has full authority, under Gen. Code 4379, to maintain discipline in the department, by suspending any officer for the causes therein enumerated, "and for any other reasonable and just cause." It may be urged that this procedure is too lengthy and complicated, and that the chief should have the power to deal swiftly with minor offenders. The legislature, in my opinion, has seen fit to take this power from him, and has vested all power of enforcing discipline in the executive head of the department, in the director of public safety. I can only say, as was said by Judge Summers in the case of *State v. Baldwin*, 77 Ohio St. 532, 552 [83 N. E. Rep. 907; 12 Ann. Cas. 10] :

"This method seems to have been evolved from experience. But the wisdom of it or effectiveness of it is not a matter for our consideration. We have only to determine what the legislature in its wisdom has prescribed."

The chief of police, under Gen. Code 4379, has the initiative. The director of public safety cannot begin a proceeding against an officer of the police department for any of the causes specified in that statute, but obtains his jurisdiction to try and determine charges by reason of the certification provided for in Gen. Code 4380. So that, in its last analysis, the chief of police, by the power of suspension, conferred upon him by law, may present any offender against the rules and regulations of the department to the executive head of the department for trial,

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he being the one fully clothed with all the power of a judicial tribunal to conduct such a proceeding.

I have already stated that I am not prepared to say, under the pleadings, that there was such suspension under Gen. Code 4379 as entitled the relator to the certification provided by Gen. Code 4380. Being in doubt as to this, I will refuse the peremptory writ of mandamus. I am, however, of the opinion that the penalty imposed upon the relator was without legal authority and absolutely void; and I will, therefore, permanently enjoin the defendants from deducting any amount from the pay due the relator as an officer of the police department of the city of Cleveland, as asked in his petition.

BONDS—INJUNCTION—MUNICIPAL CORPORATIONS.

[Ottawa Common Pleas, February 26, 1910.]

JOHN MOORE v. ELMORE (VIL.)

1. Bonds under Longworth Act Cannot be Sold to Pay Rental for Lease of Waterworks not Erected.

Paragraph 11 of Gen. Code 3939 providing that municipalities may sell bonds "For erecting or purchasing waterworks and supplying water to the corporation," is to be read literally and cannot be construed to authorize the sale of bonds to pay rental under a lease of waterworks not erected.

2. Statutory Provision Providing for Leasing Waterworks Held Express Grant of Power.

The provision of R. S. 1536-205 (Gen. Code 3809) that "any village * * * may contract * * * for the leasing of the waterworks plant" is an express grant of power to lease such plant.

3. Waterworks Franchise may be Granted to Individual.

A franchise ordinance to erect a waterworks system in a village may be granted to an individual as well as to a corporation.

4. Village may Lease Waterworks System.

A village, prevented by inability to vote sufficient bonds to construct a waterworks system, may grant a franchise to an individual in advance to construct a waterworks system and at substantially the same time lease the same for a period of ten years as provided by Gen. Code 3809.

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5. Ordinance Granting Waterworks Franchise with Lease and Option Provisions not invalid as Containing More than One Subject.

A franchise ordinance authorizing the construction, maintenance and operation of a system of waterworks and providing the village may lease the same and also for an option thereon at the expiration of the period is not objectionable upon the ground of indefiniteness, uncertainty and as containing more than one subject; the lease and option features are conditions of the franchise and not subjects of limitation.

6. Failure to Perform Contract Conditions Waived by Council not Enjoinable.

Failure of a contractor to comply with the conditions of a contract with a village council which are waived by such officials, in the absence of fraud or misconduct on their part, is not cause for injunction against the performance of such contract, especially if such failure does not result prejudicially to the community.

[Syllabus approved by the court.]

MOTION to dissolve injunction.

A. F. Allyn, G. W. Keightley, for plaintiff:

Municipal powers, *Ravenna v. Pennsylvania Co.* 45 Ohio St. 118 [12 N. E. Rep. 445]; *Bloom v. Xenia*, 32 Ohio St. 461.

Limitations on subjects of ordinance, *Morrow Co. Illum. Co. v. Mt. Gilead*, 10 Dec. 235 (8 N. P. 669); *Marion Water Co. v. Marion*, 121 Ia. 306 [96 N. W. Rep. 883]; *Sample v. Verona*, 94 Miss. 264 [48 So. Rep. 2]; *Lincoln Land Co. v. Grant*, 57 Neb. 70 [77 N. W. Rep. 349].

Lease of waterworks not in existence, *Elyria Gas & Water Co. v. Elyria*, 57 Ohio St. 374 [49 N. E. Rep. 335]; 34 Cyc. 879; *Thomas v. Railway*, 101 U. S. 71 [25 L. Ed. 950]; *People v. Kelsey*, 14 Abb. Pr. (N. Y.) 372; *Bacon v. Bowdoin*, 39 Mass. (22 Pick.) 401; *Shaw v. Farnsworth*, 108 Mass. 358; *Western Boot & Shoe Co. v. Gannon*, 50 Mo. App. 642; 24 Cyc. 923, 924.

Construction of statutory phrase "erecting or purchasing waterworks," *Smith v. Nashville*, 88 Tenn. 464 [12 S. W. Rep. 924; 7 L. R. A. 469]; *Thompson-Houston Elec. Co. v. Newton*, 42 Fed. Rep. 723; *Christensen v. Fremont*, 45 Neb. 160 [63 N. W. Rep. 364]; *Jackson v. Nelsonville*, 77 Ohio St. 637.

Indefiniteness of bond ordinance, *Heffner v. Toledo*, 75

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Ohio St. 413 [80 N. E. Rep. 8]; *Henderson v. Cincinnati*, 81 Ohio St. 27 [89 N. E. Rep. 1072].

Scott Stahl, for defendant.

REED, J.

Prior to October 19, 1909, the village of Elmore attempted to vote bonds for the purpose of building a waterworks system. The plaintiff in this action commenced an injunction proceeding in this court to enjoin the issuing of the bonds, and upon the petition a temporary restraining order was granted. That case is still pending and undisposed of. In October, 1909, the village of Elmore passed an ordinance granting to J. F. Cole, his successors and assigns, the right to construct, maintain and operate a system of waterworks in the village of Elmore. On November 15, 1909, the village of Elmore passed an ordinance to provide for the execution of a lease of a system of waterworks; the ordinance provided for the leasing of the waterworks which Cole is to construct under the franchise ordinance theretofore passed. This last named ordinance fixes the terms and conditions of the lease, and provides the amount to be paid each year for the use of the waterworks system. On the same day, to wit, November 15, 1909, the village of Elmore passed an ordinance to issue bonds in the sum of \$2500 for the purpose of supplying the village of Elmore and the inhabitants thereof with water. These bonds were about to be issued and were advertised for sale when the plaintiff filed this action to enjoin the village from carrying out the provisions and conditions of the lease ordinance, or from issuing, selling or disposing of the bonds about to be issued in pursuance of the ordinance of November 15, 1909.

A temporary injunction was issued in this case, and the matter comes up now for hearing upon the application of the defendants to dissolve this injunction.

The plaintiff claims, in the first instance, that the whole proceeding on the part of the defendants is in the nature of a scheme to foist upon the citizens of the village of Elmore a waterworks system without giving them an opportunity to express their desire at an election; that the defendants are acting in fraud of the rights of the citizens of the village of Elmore,

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and the court ought to interfere to prevent it. Upon the hearing and in the arguments nothing was said about this claim in the petition, and it being well settled as a rule of law that presumptions are all in favor of the good faith of public officials who act, there is nothing in the case from which the court would be justified in drawing the conclusion that there was any fraud in this transaction. On the contrary, I am of the opinion that the public officials in whatever they have done in this matter have acted in the utmost good faith, believing at least they were acting in the interest of the whole people of the community. This seems to me to be a conclusive answer to this contention.

It is claimed on behalf of the plaintiff that the franchise ordinance granting to Cole the right to erect a waterworks system in the village of Elmore and maintain the same is void because there is no authority in law for granting such a right or privilege to an individual; that under the law of Ohio such a franchise or privilege can only be granted to a company or corporation. And in support of this contention it is claimed that the village has no authority except that which is directly given to it by law, and such additional authority as is necessary to carry into effect the express authority granted. This contention of the plaintiff is not tenable because it is not a question of the authority of the village to do a thing; it is rather the construction to be put upon the statute. And construing the statutes so as to give effect to the intention of the legislature in permitting villages of this character to grant such privileges, it seems to me that the language is broad enough to authorize the granting of such a franchise as was granted by the village of Elmore to an individual; and, having reached that conclusion, it seems to me clear that the franchise cannot be declared void on this account. In other words, it being the intention of the legislature to permit villages to grant these franchises or privileges, there can be no reason why it could not grant such a privilege to an individual as well as to a company or corporation. And, having reached the conclusion it was the intention of the legislature to so provide, the court will read into the statute

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the word "individual" and thus give effect to the intention of the legislature.

It appears from the pleadings and the testimony upon the hearing that the waterworks provided for in the franchise granted to Cole has not as yet been constructed, and, as has been said, the whole thing is on paper. And the plaintiff asserts that the lease ordinance is void because the authority, if there is any authority, to make a lease of a waterworks plant, presupposes the existence of such a plant, and that must be in existence a waterworks plant before the village is authorized to enact an ordinance leasing the same; and some authorities have been cited in support of this claim. I do not know of any reason in law, or in good morals, that would prevent the village from entering into such an arrangement as has been made in this case. If the village is prevented by reason of its inability to vote sufficient bonds to construct a waterworks system, why may it not agree with Cole in advance that if he will construct a waterworks system the village will lease the same for a period of ten years? These laws are enacted for the protection of the taxpayers, and to prevent fraud, and I cannot see wherein the rights of the public will be greatly prejudiced, or prejudiced at all, by permitting such arrangement as has been made in this case. It is quite fair to presume that the citizens of the village of Elmore are desirous of having a waterworks system if the same can be procured according to law. In fact, a waterworks system is almost indispensable to any community the size of the village of Elmore. The citizens speak through the officers of a village, and the council have taken action in the matter, and the court is bound to assume that its action represents the will of the people. And I am inclined to the opinion that there is nothing in the claim that would prevent the village from entering into an arrangement like the one at bar; that is, from granting a franchise and at substantially the same time entering into a lease ordinance.

The plaintiff further asserts that the franchise ordinance is void because it is indefinite and uncertain, and contains more than one subject which is not expressly stated in the title. I

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have examined the authorities submitted in support of this contention, and am of the opinion that the claim is not well founded. The franchise ordinance authorizes the construction, maintenance and operation of a system of waterworks, and it provides that the village may lease the same, and also for an option at the expiration of a period of years. If the claim of the plaintiff is well taken, then a city or village could never protect itself by providing for a lease, or providing for an option, because if it gave a straight franchise without these provisions it would have to depend upon the will of the party to whom the franchise was granted, or its successors and assigns, whether an option should be granted or a lease ordinance entered into. These things are not new subjects. They are conditions of the franchise, and not new subjects of legislation. In other words, the franchise is a franchise to Cole permitting him to construct and maintain a system of waterworks in the village of Elmore, and lay mains in the streets, etc., conditionally. I know of no rule of law or decisions that would prevent the council of the village from asserting its rights in case it should in the future desire to take over the property, either by lease or by purchase.

It is also set forth that J. F. Cole has in numerous ways failed to comply with the conditions of the ordinance on his part to be performed. These are matters in my opinion that may be properly waived by the village council; and in the absence of fraud or misconduct on the part of the public officials, a court of equity will not enjoin the carrying out of a contract such as the one under consideration. Before a court of equity will interfere with the acts of the officers of a municipality, such as the village of Elmore, it must appear clearly and convincingly that it is necessary for the court to do so to protect the community from a manifest injury; and where it appears that the council are exercising an honest judgment and acting in good faith, even though it may be waiving some rights which it may enforce, if it desires to do so, a court of equity will not enjoin, especially in the absence of evidence that such act will result prejudicially to the community. The things of which the plaintiff complains as not having been complied with by Cole are

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unimportant matters that the village may at any time exact and fully protect its rights.

R. S. 1536-205 (Gen. Code 3809) further claimed that the village had no authority to lease a waterworks system.

"That the council of any village may make a contract with any person, firm or company, for the leasing of the waterworks plant of any person, firm or company therein situated for a period not exceeding ten years," does not directly authorize such lease to be made, but is intended merely to provide that in case such lease is made, the certificate that the money is in the treasury does not need to be on file; that this statute should be read altogether, and is intended merely as a restriction upon the right of a municipal corporation to contract obligations, and that this language is merely an exception and not an express grant of power. If this is not an express grant of power to lease a waterworks system, there is none to be found in the statute. The language is plain and unambiguous. It authorizes cities or villages to lease waterworks systems. It cannot be said that it creates an obligation to be paid by the taxpayers because it may be presumed that careful and conservative management will make it more than self-sustaining. Who can say at this time that if this waterworks system is built and the village takes it over and manages it properly, it will not be self-sustaining? And it may produce a source of income to the village beyond any obligation that the village by and through this lease ordinance assumes or undertakes to pay. This is an answer to the claim that before this sort of an arrangement can be made it must be submitted to a vote of the people. This does not conflict with Gen. Code 3981, which provides that the city council may contract for a water supply, but that before entering into such contract the proposition must be submitted to a vote of the inhabitants, because in such a case there is an obligation to be made. There is no limit during which such contract shall exist, and the legislature has seen fit to make this distinction, that where the municipality leases the waterworks system and undertakes to operate it, it may do so for ten years without submitting it to a vote of the inhabitants of the municipality;

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but if the municipality undertakes to contract for water for a period of time, it must submit it to a vote. It may be urged that there is no reason for the distinction. The court has nothing to do with this. It is sufficient to say that the legislature has made the distinction, and therefore the courts must be guided by the law as it finds it and not be influenced by the fact that the legislature may have protected the public in one regard and failed to provide the same safeguards for the public if the same thing is done in some other way. It may be said, and undoubtedly is true, that the legislature considered that if the municipality had the charge and control of the system of waterworks, received the rents, profits and income therefrom, it could protect itself. And again, it may be said that the legislature intends to encourage as much as possible any municipality in owning and operating its public utilities. And while this limit in time is the nature of public ownership for a period of time, whether it be true or false, it is generally supposed that a municipality can furnish to its inhabitants light, heat and water at a less expense and render better service than can a private corporation that may under our present law over-capitalize and over-bond its property, and thus create a condition that necessitates exorbitant charges to meet fixed demands. I have briefly stated my reasons for the conclusion which I have reached as to the franchise ordinance and the lease ordinance, and this brings me to the question of the bond issue. The only authority that the village has to issue bonds is that granted by the legislature. The defendant contends it is authorized under paragraph 11 of R. S. 2835 (Gen. Code 3939), to issue these bonds. This paragraph reads as follows:

“For erecting or purchasing waterworks and supplying water to the township, or corporation, and the inhabitants thereof.”

The defendant contends it has a right to issue bonds under this subdivision of the statute for the erection or purchase of waterworks, or for supplying water to the inhabitants of the community; that the word “and” should be taken out of the statute and in its place the word “or” should be inserted.

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That is, that the court should read the word "or" in the statute in the place of "and." In a matter of so much importance as the issuing of bonds which become a charge against the community the law must be strictly construed, and the power of the municipality must be limited absolutely to that granted to it by the legislature. This statute should be read literally. The court cannot read anything into it or change its plain meaning. Giving it that construction which the court is required to give it, the only authority the village has to issue bonds is for the erection or purchase of waterworks for the purpose of supplying the inhabitants with water. The bonds in question are not being issued for the purpose of erecting or purchasing a system of waterworks. On the contrary the purpose is to use the money to pay a rental under a lease. Therefore, the village not being authorized to issue these bonds, its act is void.

I might add, however, in this connection that even if this statute could be construed so as to permit these bonds to be issued under proper conditions, I doubt very much the advisability of this bond issue at this time. Mr. Cole has not yet complied with his contract. There is no system of waterworks in existence in the village of Elmore, and it will be time enough to incur obligations when there is a necessity for it. It is not my purpose to advise the village council of Elmore as to the manner in which it should conduct its affairs, but it might not be out of place at this time to suggest that good faith would require some action on the part of Mr. Cole indicating an intention to carry out his part of the contract before the taxpayers of the village of Elmore are burdened with a bond issue.

A decree will, therefore, be entered in favor of the plaintiff to the extent that the defendant will be enjoined from issuing or selling the bonds. In all other respects the decree will be in favor of the defendant and the defendant will be taxed with the costs. Exceptions may be noted, and bond fixed at \$100.

I neglected to speak of the effect of the previous bond issue and the pending injunction suit. It seems to me the village

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can abandon that proceeding at any time and by granting a franchise to Mr. Cole and enacting the lease ordinance, I am of the opinion it has in effect done so.

CIVIL RIGHTS.

[Cuyahoga Common Pleas, August 7, 1912.]

LEROY FOWLER v. C. T. BENNER.

Ice Cream Parlors within Civil Rights Proscriptions.

A confectionery store, popularly denominated an "ice cream parlor," having chairs, tables and other conveniences for the sale of "ice cream," "soda water," "candy," "cigars" and "magazines," as advertised and displayed, is a "place of public accommodation" within the meaning of Gen. Code 12940, 12941, proscribing a penalty for denial of privileges at inns and other places by reason of color.

[Syllabus approved by the court.]

ERROR to justice of the peace.

Sutton & Brown, for plaintiff in error.

Lang, Cassidy & Copeland, for defendant in error.

FORAN, J.

On October 4, 1910, the plaintiff in error filed a bill of particulars in the justice court of R. T. Morrow, asking damages against the defendant in error in the sum of \$300, for being wrongfully refused accommodations by the defendant in error, at his place of business on Hough avenue in the city of Cleveland, Ohio.

On October 29, 1910, the cause was tried to a jury. At the conclusion of the plaintiff's testimony, on motion of the defendant's counsel, the court directed the jury to return a verdict for the defendant, which was accordingly done. To all of which the plaintiff then and there excepted, and now prosecutes error to this court to reverse the judgment so rendered against him.

The action was brought and is prosecuted under and by virtue of R. S. 4426-1 and 4426-2 (Gen. Code 12940, 12941), which it is claimed confer a right of action on the plaintiff in

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error, if the allegations in his bill of particulars filed in justice court are true.

The statutes which confer this right of action provide, substantially, that all persons of every race and color, regardless of race and color, within the jurisdiction of the state of Ohio, shall be entitled to the full enjoyment of the accommodations, advantages, facilities and privileges of inns, restaurants, eating houses, barber shops, public conveyances, theaters "and all other places of public accommodation"; and for any denial of the full and equal enjoyment of these rights to any citizen, except for reasons applicable alike to all citizens, a right of action accrues to the citizen aggrieved by such denial, against the person denying him such rights or refusing him such accommodations, in an amount not less than fifty nor more than \$500.

It appears from the record or bill of exceptions that the plaintiff in error, Leroy Fowler, is what is popularly known as a colored man; that he is a citizen of the state of Ohio; that on August 8, 1910, accompanied by his wife, he entered the defendant's store or place of business and took a seat at a table; that there were no other customers in the place at the time, but shortly thereafter a white lady came in, and, at her request, was served with ice cream soda and candy; that upon his request that he and his wife be served with chocolate soda, the defendant said, "I am sorry; I can't serve colored people"; that the store or place of business of the defendant had a sign on the window, stating it was a confectionery store; that ice cream, soda water, candy, cigars and magazines were there displayed for sale; and that it might be called an ice cream parlor; that on the table where the plaintiff and his wife sat there was a bill of fare, showing or indicating the drinks offered for sale. It further appears that the plaintiff in error had been to the store before August 8, 1910, and had purchased candy there; and that he and his wife left the store after the defendant had refused to serve them as above stated.

The defendant in error did not introduce any testimony.

From this record it may fairly be said that the defendant's place of business is a confectionery store and what may pop-

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ularly be denominated an ice cream parlor. The only question, then, before the court is this: Is a confectionery store and an ice cream parlor a place of public accommodation? If it is, the judgment of the justice must be reversed; if not, it must be affirmed.

A confectionery store is a place where confections, such as candies, candied fruits, bon bons, caramel comfits, cake and ice cream and other articles prepared with sugar are usually sold. An ice cream parlor is a place where ice cream and confections are sold. It is supplied with tables and chairs for the accommodation and convenience of its patrons. It is also generally, if not invariably, provided with what is known as a soda fountain, by which its patrons may be furnished with a great variety of refreshing drinks, including coffee, either hot or cold. Does such a place come within the meaning of the language used in R. S. 4426-1? This section, after specifically naming inns, restaurants, eating houses, and theaters, says and includes "all other places of public accommodation and amusement"; that is, all other places of a similar or like nature, kind and character to those specifically enumerated. *Schultz v. Cambridge*, 38 Ohio St. 659. Is an ice cream parlor and confectionery store, where the patrons of the place are provided with tables, chairs and such conveniences and furnished with food and drink, a place similar to or of the same general character and kind as an eating house or a restaurant? It seems to us that it is, and that there is no such dissimilarity between the two as would justify any other conclusion.

It will not be denied that ice cream, cake and confections of all kinds are foods. A cafe or coffee house where food is furnished patrons is surely of the same general character as a restaurant; and a cafe chantant where the patrons are, in addition to food and drink furnished, also regaled with music and singing of an histrionic character, may also be said to be a place of the same general kind and character as an eating house and a theater. A moving picture show, no matter by what name called, is of the same kind and character as a theater. So, too, a lunch room, or a room furnished with a buffet and tables and

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chairs for the convenience of customers or patrons, would fall within the purview of the statute as a place of the same kind and character as a restaurant or eating house.

The contention of counsel for the defendant in error, that the words of the statute "all other places of public accommodation and amusement" mean, and must be construed to mean, that the place must be one of amusement as well as of accommodation, cannot be entertained. The statute specifically enumerates inns, restaurants, eating houses, barber shops, public conveyances; and the words following, "and all other places of public accommodation and amusement," must be taken to refer to the places previously enumerated respectively; that is, to places of the same general character as inns, restaurants, eating houses or theaters. An inn or an eating house is not a place of amusement, nor is a theater a place similar to an eating house, but primarily a place of amusement or entertainment of a purely intellectual or mental character. These words, then, mean, all other places of public accommodation or all other places of public amusement; and may be construed and read or whenever the sense requires it.

It may not be unprofitable at this time to inquire what is meant by "a place of public accommodation." Anderson's law dictionary defines the word public, when used as an adjective, as in the phrase "public accommodation," to mean, concerning or affecting the people or community at large; or a place for the accommodation of all persons. A public place may be defined, generally, to be a place to which any one may have access without trespassing. (See Century Dictionary.) Under this definition, a person who, by reason of his disorderly habits or condition, would be objectionable to the management or patrons of such public place, might be deemed a trespasser and be ejected therefrom, and if the place was one of public accommodation and came within the purview of the statute under consideration, such objectionable person or citizen might be denied access to such a place without violation of this statute,

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provided the rule applied to all persons and citizens irrespective of race or color.

The word "accommodation," as used in the statute, does not mean to do a favor to a person, such as to loan him money or endorse a note. "A place of accommodation," as used in the statute, means a place where the wants and desires of those who frequent the place may be supplied for a consideration. The word "place" expresses similar locality, and not of any particular kind unless qualified by an adjective.

The statute in question is based upon the fourteenth amendment to the federal constitution. In 1866 the congress of the United States passed what is known as the Civil Rights bill. The constitutional objection to this bill is, that the federal congress undertook to perform the duty of protecting the civil rights of citizens, a duty which has always been held to be peculiarly within the province of the sovereign states of the Union; hence the fourteenth amendment, which contains the gist of the Civil Rights bill. All the states of the Union have passed statutes in conformity with the Fourteenth Amendment, and in many instances similar in phraseology. The inhibition contained in the Fourteenth Amendment was intended to secure to a recently emancipated race all the civil rights that the dominant race theretofore had enjoyed. *Virginia, Ex parte*, 100 U. S. 212 [25 L. Ed. 676]. It has exclusive reference to state action.

If a law operates alike upon all persons and property similarly situated, it is not in conflict with the amendment. If it does not so operate, it is in conflict with it. *Peoria & Pekin U. Ry. v. Railway*, 127 U. S. 205 [8 Sup. Ct. Rep. 1125; 32 L. Ed. 110]; *Glasgow v. Baker*, 128 U. S. 578 [9 Sup. Ct. Rep. 154; 32 L. Ed. 513].

The statutes of Ohio, it may be said, operate alike upon all persons and citizens, and are therefore not in conflict with this provision of the federal constitution.

Counsel for the defendant in error relies largely upon the case of *Faulkner v. Solazzi*, 79 Conn. 541 [65 Atl. Rep. 947; 9 L. R. A. (N. S.) 601]. In this case it was held that the barber

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shops were not places of public accommodation. Counsel seems to overlook the fact, however, that the Connecticut statute bears no similarity to the Ohio statute, inasmuch as the statute is general in terms and does not specifically enumerate in precise terms the places where every person shall be entitled to the full and equal enjoyment of the advantages and privileges of such place of public accommodation. The Connecticut statute provided that every person who deprives another of "the full and equal enjoyment of the advantages, facilities, accommodations and privileges of any place of public accommodation or amusement or transportation" on account of race or color shall pay double damages to the person injured thereby. A glance at this statute and the words employed is sufficient to show that the court was given wide latitude in construing the language and giving construction to the words "place of public accommodation." Such latitude of construction is limited in the Ohio statute by the specific enumeration of places, followed by the words "and all other places of public accommodation." For instance, the Ohio statute enumerates inns, restaurants and eating houses, and "all other places" of the same general character or kind as an inn, eating house or restaurant.

The Connecticut decision proceeds upon the theory of the common law definition of place "affected by public interest," which, under the common law, was subject to public regulation, such as quasi public utilities and such as affect the community at large, as railroads, telegraphs, telephones, theaters, and gas and water companies. In the opinion of the court the language of the Connecticut statute was not sufficiently broad to include within its scope barber shops.

The case of *Cecil v. Green*, 161 Ill. 265 [43 N. E. Rep. 1105; 32 L. R. A. (N. S.) 566], is also quoted in support of the contention of the defendant in error. In this case it was held, and properly so, that a drug store in which soda water is sold is not a place of public accommodation. A drug store is primarily a place where drugs and medicines are vended and sold, and the soda water fountain is merely an adjunct. A place where soda water alone is sold cannot possibly be said to be similar in nature and char-

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acter to an eating house; but a place where ice cream, confections and cake, which are foods, are sold to patrons, who are furnished with the conveniences of tables and chairs, is in the opinion of the court decidedly a place of the same general kind and character as an eating house or lunch room.

A place of public accommodation, within the meaning of this statute, is generally a resort where those who frequent it remain more or less at ease and comfort for some considerable length of time for the purpose of being physically refreshed and benefited, and for the purpose of transacting business with those who accompany them or those they meet there, by appointment or otherwise. Hence a drug store, a dry goods store, a grocery store or similar establishment is not a place of public accommodation within the meaning of this statute.

The case of *Keller v. Koerber*, 61 Ohio St. 388 [55 N. E. Rep. 1002], is also cited. In this case it is held, that a place where intoxicating liquors are sold at retail is not, within the phrase "all other places of public accommodation and amusement." The opinion in this case is a *per curiam*, and is not, we freely admit, as conclusive and illuminating as we might wish. In speaking of places where intoxicating liquors are sold as being within the meaning of the phrase "all other places of public accommodation and amusement," the court says: "This view is much discouraged by the dissimilarity between a place where intoxicating liquor is sold and those which the statute specifically designates." This is not wholly satisfactory. We must look further to obtain the real basis of the decision. The court proceeds to say, that the policy of the state of Ohio is opposed to the traffic in intoxicating liquor, assuming that it is an evil, and seeks to discourage and restrict it, and for that reason the court refused to "interpret this statute as encouraging a traffic which the clearly defined policy of the state discourages."

It is true the court says the statutes of Ohio forbid, under penalties, the sale of intoxicating liquors to minors and persons intoxicated or in the habit of becoming intoxicated, and for that

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reason a condition should not be inferred which would place the saloon keeper in peril when he refuses to sell to any one; but in as much as these statutes apply alike to all persons, regardless of race or color, this can not be the real basis of the decision, which seems to rest clearly upon the theory that this statute should not be so interpreted or construed as to encourage a traffic which the clearly defined policy of the state discourages, by holding that a saloon is a place of public accommodation.

This is in line with the doctrine announced in *Rhone v. Loomis*, 74 Minn. 200 [77 N. W. Rep. 31], where it is held that a saloon does not fall within the provisions of the law containing the general phrase, "all other places of refreshment." It may surely be said that there is a decided difference of opinion as to whether intoxicating liquors are a refreshment. Possibly, taken in but moderate quantities, they may refresh and exhilarate, but if taken to excess, they paralyze and destroy. And for this reason we are not enlightened by the doctrine of *Rhone v. Loomis*, *supra*. Referring, however, to the Ohio case of *Keller v. Koerber*, *supra*, it clearly appears that a saloon was held not to be a place of public accommodation and amusement, for the reason that the clearly defined policy of the state discourages the traffic in intoxicating liquors and regards this traffic as an evil. The decision being based solely upon that ground, it follows, inferentially, that if a saloon or a place where intoxicating liquors are sold was not in conflict with the clearly defined policy of the state, it would be held to be a place of public accommodation. If this be true, how much greater reason have we for holding that a place furnished with tables and chairs and other conveniences for those who frequent it, and where foods and refreshing, nonintoxicating drinks are furnished, is a place of public accommodation.

It is true that the civil rights statutes are, to some extent, in derogation of private rights, and restrictive of the liberty which a citizen ordinarily enjoys to deal only with those persons with whom he chooses to hold business relations. But it must be remembered that the court assumes no responsibility for the enactment of these laws. The duty of the court, in this

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instance, is wholly that of interpretation and construction; besides, we believe that, as a general rule, a gentleman, whether white or colored, will never obtrude himself into a place where he knows his presence may be embarrassing or objectionable to the proprietor or his customers.

The statute in question does not prevent the proprietor of any place of public accommodation from refusing to serve any person who, by reason of his disorderly conduct and habits, is objectionable to him or his patrons; but in the exercise of such right of refusal he must not discriminate against a man solely on account of his color or race. We must treat all citizens, irrespective of color or race, precisely alike.

For the reasons above indicated, the judgment of the justice court will be reversed and the case retained in this court for further proceedings.

NEGLIGENCE.

[Hamilton Common Pleas, April, 1911.]

ANNA M. STONE v. S. E. HARVOUT.

Negligence not Implied by Fact that Horse Unhitched and Unattended Ran Away.

The mere fact that a horse was left unhitched and unattended is not *prima facie* evidence of negligence; hence, in an action for damages on account of injuries resulting from the horse running away, the question of the owner's negligence is one to be determined by the jury from all the circumstances of the case.

Hosea & Knight, for plaintiff.

C. J. McDiarmid and *F. M. Coppock*, for defendant.

HUNT, J.

This action is for damages by reason of defendant's alleged negligence in leaving his horse unhitched and unattended. The horse ran away, and plaintiff while walking in the road was struck and injured. Defendant denies the negligence and sets up contributory negligence of the plaintiff. The jury gave a verdict for the defendant, and plaintiff files a motion for a new trial.

As to defendant's negligence, the mere fact that the horse was left unhitched is not *per se* evidence of negligence. Such fact is to be considered by the jury in connection with the other

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circumstances of the case. There are many authorities both *pro* and *con* upon the question. See 3 Enc. Law & Prac. 1016. An examination of many of the cases cited therein as well as of all the cases cited in the briefs of counsel indicates that the weight of American authority, especially in states in which the court is not permitted to give to the jury its opinion as to the evidence, is in favor of the rule above stated. Ohio has two cases, *Loeser v. Humphrey*, 41 Ohio St. 378 [52 Am. Rep. 86], and *Pickens v. Diecker*, 21 Ohio St. 212 [8 Am. Rep. 55], one of which is given as supporting the contrary rule, but a critical examination of such case shows that it is not properly so cited.

In the first case the question was not raised or passed upon, the action being for negligently leaving the horse without being properly tied or guarded, or as the court says, "not securely tied."

In the second case the negligence was "in attempting under the circumstances" after they had run away and broken their harness, "to lead the horses with no other means of guiding or holding them than the halter."

In the present case, while the circumstances under which the horse was left unhitched might be regarded as not being ordinary as applied to such horse, and that it was negligence for the defendant, therefore, under the circumstances, to leave the horse unhitched, nevertheless that was a question for the jury, and their finding thereon should not be disturbed.

Plaintiff's contributory negligence was made an issue by the pleadings, and there was at least a scintilla of evidence in support thereof, requiring the court to charge thereon. The fact that the court may think that such evidence was not sufficient to establish plaintiff's contributory negligence, does not give the court a right to set aside the verdict for the defendant, for *non-constat* but that the jury may have found that the defendant was not guilty of negligence, and, as above stated, such question under the circumstances being a question for the jury, the finding of the jury thereon should not be disturbed.

The motion for a new trial is therefore overruled.

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WILLS.

[Greene Common Pleas Court, 1912.]

*M. C. McMILLAN v. S. J. McMILLAN ET AL.

Provision for Unborn Children by Testator Having no Children at Time of Execution of Will is Effective.

When a testator having no children at the time of executing his will has made clear his intention that his will shall apply to unborn children, such provision is one contemplated by Gen. Code 10561 and the court will not inquire whether it is large or small, equal or unequal, vested or contingent, present or future. *Rhodes v. Weldy*, 46 Ohio St. 234, not followed.

[Syllabus approved by the court.]

DEMURRER to petition.

W. L. Müller, for plaintiff:

Cited and commented upon by the following authorities: *Rhodes v. Weldy*, 46 Ohio St. 234 [20 N. F. Rep. 461; 15 Am. St. Rep. 584]; *German Mut. Ins. Co. v. Lushey*, 10 Dec. 24 (7 N. P. 62); *German Mut. Ins. Co. v. Lushey*, 11 Circ. Dec. 52 (20 R. 198); *German Mut. Ins. Co. v. Lushey*, 66 Ohio St. 233 [64 N. E. Rep. 120]; *Weiland v. Muntz*, 25 O. C. C. 185 (2 N. S. 71); *Baacke v. Baacke*, 50 Neb. 22 [69 N. W. Rep. 303]; *Toedtemeier v. Clackamas County*, 34 Ore. 72 [54 Pac. Rep. 954]; *State v. Gardner*, 3 S. Dak. 557 [54 N. W. Rep. 606]; *Uhe v. Railway*, 4 S. Dak. 515 [57 N. W. Rep. 484]; *Verrinder v Winter*, 98 Wis. 287 [73 N. W. Rep. 1007]; *Donge, In re*, 103 Wis. 497 [79 N. W. Rep. 786; 74 Am. St. Rep. 885].

Marcus Shoup, for defendant.

KYLE, J.

The plaintiff brings this action to have his title to 109 acres of land quieted as against the defendants and in his petition avers that he is the only son of Hugh McMillan, who died in February, 1894, leaving the defendant, S. J. McMillan, his wife and the defendant, John McMillan, one of the beneficiaries named in his will.

*Affirmed, no op., by circuit court, April 23, 1912.

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The will of Hugh McMillan is set out in full, and the plaintiff claims by the terms of said will he is entitled to have his title to said lands quieted as against each of said defendants.

The defendant, S. J. McMillan, demurs to the petition, and the determination of the questions raised upon the demurrer involves the construction of the will of Hugh McMillan.

The part of the will determinative of the rights of the parties is the following:

"At the death of my said wife in case she should have no children or child by me living, then and in that case if said farm was not sold by my said wife they shall each inherit said farm equally, share and share alike, and in case that my said wife shall not have any children living and she be the owner of said farm and homestead." * * *

It is apparent that the word "no" in the clause above given should be disregarded in order to give the will any meaning and carry out the intent of the testator and the will will be considered as if such word "no" were omitted.

The question presented, which was argued very fully, is whether or not the provision made by the testator for his children born after the execution of his will, which is residuary or conditional, is such provision contemplated under Gen. Code 10561? In this case the testator having no children at the time of the execution of his will, the construction of this will depends upon the effect given of the law laid down in *Rhodes v. Weldy*, 46 Ohio St. 234 [20 N. E. Rep. 461; 15 Am. St. Rep. 584], where the Supreme Court construed Gen. Code 10561. In that case the testator devised his real estate to his wife for life "and after her death to the heirs of her body begotten," and the court held that a child born to him after the execution of the will is not "provided for in the will in the sense of R. S. 5969."

On page 237 the court says:

"It will not be contended that this is a specific provision for the plaintiff. If it is a provision at all it is so because the language is comprehensive enough to include her. It was evidently written with a view only to the maternity of the heirs

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of her body begotten' and without reference to their paternity. * * * The question is: Has Elizabeth 'been provided for in the will' in the sense of the statute? It is not conclusive of this question to say that a 'disposition' has been made which may inure to her benefit. 'Disposition' and 'provision' are not necessarily convertible terms."

In *Waterman v. Hawkins*, 63 Me. 156, it was held that "a child of the testator born after his death can not in any proper sense of the term be deemed 'provided for in his will' by a general devise of reversion to the heirs of the testator."

In *Willard's Estate*, 68 Pa. St. 327, it was held that where the testator gave to his wife his property during her life and at her death was to revert to the testator's children and heirs, was not a provision for the after-born children within the meaning of the statute, which provided that unless such after-born children were provided for the will would be deemed revoked as to them.

In all these cases and others where the after-born child was incidentally included in a class, such interest is not such a contemplation by the testator of any unborn child as to come within the meaning of the statutes "unless said child is provided for." There must be in the mind of the testator a specific designation of his purposes and desire with respect to such unborn child as to show that their consideration was clearly in his mind with respect to his property, and on that ground the case of *Rhodes v. Weldy*, *supra*, could have rested without any other reason, but in that case Judge Owen in his opinion goes on further and states that a reversionary or contingent interest for an unborn child is not a provision within the meaning of R. S. 5969, that such interest must be a present vested interest.

In support of this the court says, "The case of *Willard's Estate*, *supra*, is, we think, directly in point." In that case the court held:

"That a reversionary interest, whether vested or contingent, is not a provision for an after-born child within the words or spirit of the statute."

To the same effect the prior cases of *Hollingsworth Appeal*,

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51 Pa. St. 518; *Lamplugh v. Lamplugh*, 1 Peere Wms. 111, which were also quoted by Judge Owen in *Rhodes v. Weldy*, *supra*.

All these cases in Pennsylvania are overruled in *Newlin, In re*, 209 Pa. St. 456 [58 Atl. Rep. 846; 68 L. R. A. 464], where the court holds:

"The act of April 8, 1833, Sec. 15, P. L. 249, relating to the revocation of a will by the subsequent birth of a child makes no requirement that the child shall be fully or adequately provided for; that is left to the discretion of the parent as in the case of living children. All that it does require is that he shall have the child in mind and shall make clear his intention that the will shall apply to it. Any provision which does this is sufficient and the inquiry whether large or small, equal or unequal, vested or contingent, present or future, is irrelevant and outside the jurisdiction of the courts except so far as it tends to throw light on the question of intention."

In the opinion the court criticises *Eckman v. Eckman*, 68 Pa. St. 463:

"It is true that Judge Sharwood fortifies his position by an argument that if the child take as heir with the other children that he takes only a reversion, which in *Edwards Appeal* Judge Woodward had gone out of his way to say would not be a present provision within the statute. But that this argument is only a make weight appears clearly from what is said by Judge Sharwood in the same opinion."

To the same effect is the case of *Randall v. Dunlap*, 218 Pa. St. 210 [67 Atl. Rep. 208]. The case of *Bowen v. Hoxie*, 137 Mass. 527, is also relied upon by Judge Owen in *Rhodes v. Weldy*, *supra*. In that case the share which would come to the after-born child came to her only as one of a class, the provision for her was unintentional and the most that could be said that the provision for the class happened to be broad enough to include her. That would support the first ground upon which *Rhodes v. Weldy*, *supra*, is based.

In *Minot, In re*, 164 Mass. 38 [41 N. E. Rep. 63], the court held that a reversionary interest after the death of the wife to

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his heirs at law by blood was a provision for an unborn child and distinguishes it from *Bowen v. Hoxey*, *supra*, and held that a reversionary interest was sufficient to fulfill the requirements of the statute and overruled the case of *Bowen v. Hoxey* to that extent, if it was quoted in *Rhodes v. Weldy*, *supra*, for that purpose.

Holloman v. Copeland, 10 Ga. 79, is also quoted by Judge Owen. The Georgia statute required that there must be a positive provision made for an unborn child. In *Sutton v. Hancock*, 115 Ga. 857 [42 S. E. Rep. 214], it was held that a bequest to the wife "and that she shall take every care of our children and do what is just and right by each of them" is not a provision made in contemplation of such event "of after-born children."

It appears to me that every case referred to upon which Judge Owen may have based his reasoning that a reversionary or conditional interest is not such provision as is contemplated by the statute for an unborn child has been overruled.

In *Osborn v. Bank*, 116 Ill. 130 [4 N. E. Rep. 791], where the statute provides that an after-born child for whom no provision has been made by will, will take by law that any bequest no matter how insignificant it may be or upon what contingency, however remote, is sufficient to comply with the statute within the meaning of a provision made by will.

See also *Donges, In re*, 103 Wis. 497 [79 N. E. Rep. 786; 74 Am. St. Rep. 885], where most of the cases referred to in and including *Rhodes v. Weldy*, *supra*, were reviewed, the court held that a reversionary interest constitutes a provision for an unborn child within the meaning of their statute.

The case of *German Mut. Ins. Co. v. Lushey*, 66 Ohio St. 233 [64 N. E. Rep. 120], has been cited by the plaintiff. In that case the testator had a child living, after disposing of his property further provided:

"Should any child or children, we now having only one, George Garfield, be born to me thereafter it shall in nowise alter or revoke this will and testament."

The court held that that provision did not preclude the unborn child from taking under R. S. 5961. That section pro-

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vides what interest an unborn child may have as against the will of a testator who had a child or children living at the time he made his will. R. S. 5959 applies to a case where the testator has no children at the time of the execution of his will, and there are afterwards children born. These sections are independent of each other, and *German Mut. Ins. Co. v. Lushey, supra*, does not attempt to give any construction to R. S. 5959.

When this case was before the circuit court reported in *German Mut. Ins. Co. v. Lushey*, 11 Circ. Dec. 52 (20 R. 198), the court in referring to *Rhodes v. Weldy, supra*, after quoting *Willard's Estate, supra*, and *Hollingworth Appeal, supra*, and *Waterman v. Hawkins*, said:

"These cases are cited with approval in the case of *Rhodes v. Weldy, supra*, where the construction of R. S. 5959 was involved, and seem to require that the provision for an after-born child should be not only substantial but for his direct and immediate benefit."

R. S. 5959 provided:

"If the testator had no children at the time of executing his will, but shall afterward have a child living, or born alive after his death, such will shall be deemed revoked, unless provisions shall have been made for such child by some settlement, or unless such child shall have been provided for in the will, or in such way mentioned therein as to show an intention not to make such provision, and no other evidence to rebut presumption of revocation shall be received."

The codifiers in the General Code changed the language so that Gen. Code 10561 provides:

"If the testator had no children at the time of executing his will, but afterward has a child living, or born alive after his death, such will shall be revoked, unless provision has been made for such child by some settlement, or he is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision. No other evidence to rebut the presumption of revocation shall be received."

The phrase "or he is provided for in the will" is almost

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exactly like the Pennsylvania statute which is "or have a child or children not provided for in such will."

In *Rhodes v. Weldy*, *supra*, the court construed the clause "provisions by some settlement" to mean at least a substantial present means of maintaining the child, and they say, p. 242:

"When we have ascertained what a provision for a child of tender years by some settlement is, we shall have made good progress in the solution of the question at bar. It would not be a sound proposition to say that the same word occurring in different places in the same statute always means the same thing. It may sometimes call for a radically different construction. But where the same word or phrase is used more than once in the same act, especially in the same section and in the same sentence, in relation to the same subject-matter and looking to the same general purpose, it is a fundamental rule of statutory construction that if in one connection the meaning is clear and in the other it is otherwise doubtful or obscure, it is in the latter case to be construed the same as in the former."

On p. 243 the court further says:

"The general subject treated in these two expressions is the same, to-wit: A provision for an after-born child which shall save a will from the revocation which must otherwise result from the birth of such child after the execution of the will. Giving to the word 'provision' in the one phrase substantially the same construction which the word 'provisions' is clearly entitled to in the other, and, the conclusion is that Elizabeth was not 'provided for in the will' by the devise of the testator's lands to his wife to use and occupy as to her may seem proper, during her natural life, and after her death to the heirs of her body begotten."

That conclusion is decisive of the case at bar, unless the change made by the codifiers permits a different construction, or unless this court should not agree with the reasoning of the court in that particular. The change in the statute is in the two phrases from "or unless such child have been provided for in the will" to "or he is provided for in the will."

The Supreme Court seem to have based their construction

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upon the above phrase upon their construction of the previous one in respect to a settlement, holding that a settlement, must be immediate, therefore the provision in the will must be immediate.

I am free to say without the *stare decisis* I would have had no difficulty in concluding that by the terms of this section the provision for a settlement might be construed to be immediate provision, while the provisions in the will might be immediate, contingent or reversionary, or the such after-born child might be debarred by a proper declaration of intention. If you hold that the provision in the will must be a present one to carry out the same line of reasoning the court should pass on its adequacy. If a testator of large estate should will each of his after-born children one dollar and no more as a present bequest, how could the claim be made that there was any provision for such children? The reasoning in *Willard's Estate, supra*, and quoted with approval in *Rhodes v. Weldy, supra*, that such after-born children in case of a statutory bequest might be left dependent upon their mother is rather a weak argument to my mind. If any testator could not leave his after-born children of tender years in the care of their mother, then to whose care could he commit them? From my experience and observation they would not be likely to suffer nearly as much were the mother to have a free hand to use the estate for their maintenance as they might be if it were tied up in the hands of some trustee and possibly a large part of the income used to maintain the trust. I do not think that the statute contemplates any such view as taken by the Suprem Court in *Rhodes v. Weldy, supra*. I think the interpretation that the bequest of a residuary or contingent interest is not a provision for an unborn child clearly designated within the meaning of the statute is not justified by the language of the code, and the authorities quoted above. Every authority relied upon in *Rhodes v. Weldy, supra*, upon this phase of the case having been overruled, and the reasoning of the court not commending itself to this court—although this court may be reversed—it seems to me that the full meaning of that section can only be given when you leave the character of

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the provision for unborn children under Gen. Code 10561 to be left wholly to the intention and declaration of the testator; and, therefore, in my judgment when a testator has made clear his intention that his will shall apply to unborn children, it is not for the court to inquire whether such provision was large or small, equal or unequal, vested or contingent, present or future, and the demurrer in this case will be sustained.

ATTACHMENT AND GARNISHMENT—CONSTABLES —PROCESS.

[Franklin Common Pleas, ———, 1912.]

MAME PARKINSON v. FRANK A. CRAWFORD.

1. Written Demand for Ten Per Cent of Debtor's Personal Earnings not Prerequisite to Garnishee Personal Earnings of Single Men.

Single men are not entitled to exemptions under Gen. Code 11721, 11738. Hence, the demand in writing for the excess over 90 per cent of the personal earnings of a debtor provided for by Gen. Code 10272, 10273, is not a prerequisite to garnishee personal earnings of such a person.

2. Service of Garnishee Process on "Agent" of Railway in Township and County of Issue Sufficient.

Service of garnishee process upon the "agent" of a railway company in the township and county of issue is a sufficient substantial compliance with Gen. Code 10266.

3. Affidavit for Attachment Stating Action is Based on Claim for Board, Lodging and Washing Sufficient.

An affidavit for attachment stating that the action is based on claim for "board, lodging and washing" is sufficient although more facts would be required in bill of particulars.

4. Affidavit Failing to Aver Liability Incurred in County of Issue Insufficient.

An affidavit in attachment before a justice of the peace, failing to aver that the liability was incurred in the county of issue, is insufficient; and no presumption can be indulged that the liability was incurred in that county; averment of essential facts requisite to jurisdiction being imperative in courts of limited jurisdiction.

5. Service of Attachment Process by Nonresident Special Constable, without Oath of Office or Bond is Defective.

A person deputed by a justice of the peace to serve process in attachment to comply with Gen. Code 1732, 1733 and Art. 15, Sec. 4, of the state constitution must possess the qualifications

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of an elector of the township in which the process is issued, take a constable's oath and should give bond required of such officers; hence, service of process in a county where none of the parties reside, by a special constable not an elector thereof, without oath of office or bond, is contrary to the spirit of the attachment laws.

[Syllabus approved by the court.]

C. W. Reynolds and *Chas. M. Doll*, for plaintiff.

J. B. Yaw, for defendant.

KINKEAD, J.

This is a three day appeal from an order made by a justice of the peace overruling a motion to discharge attachment seeking to sequester the personal earnings of an unmarried person. It is alleged in the affidavit that he is not the head of a family, has not the support of a widowed mother dependent upon him for support, that the property sought to be attached is not exempt, that all the earnings is sought to be attached, and that defendant is a nonresident.

The first question raised on motion to discharge is whether demand is essential in such case. Looking to the provisions of Gen. Code 10272 as it stands without considering its history and purpose it would seem to apply as well to attachments for necessities against single men, as of married men. But looking to its purpose and history as well as to the matter of exemptions in favor of married men which are not extended to single men, it is plain that Gen. Code 10272 as originally enacted as R. S. 6501 provided that demand was only essential in cases where the personal earnings of a married man were sought to be reached.

The statute prescribing that demand shall be made must be considered in the light of the statutory exemptions as to personal earnings, as well as with a view to the history of Gen. Code 10272 and 10273, and the purpose and intent of the amendments brought into the statutes April 26, 1898, and April 16, 1900. At the latter date it was provided that when any part of the personal earnings of a debtor is not exempt under the provisions of R. S. 5430 and 5441 (Gen. Code 11725, 11738), the garnishee may pay to such debtor an amount equal to ninety

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per centum of such personal earnings. This, in other words, withdrew from already existing exemptions ten per cent of the personal earnings which may be reached by a debtor on a claim for necessities (93 O. L. 316, 321). On April 16, 1900 (94 O. L. 376), a further amendment was made imposing a liability on the debtor to pay four dollars on the costs, and providing that the person seeking recovery of the 10 per cent shall first make a demand in writing for the excess over and above 90 per cent of the personal earnings of the debtor.

The only exemptions of personal earnings previous to these two amendments were the personal earnings of the debtor, and of his minor child, for three months previous to attachment when the same are necessary to the support of the debtor and his family. Gen. Code 11725 (R. S. 5430). The other was the \$500 in lieu of a homestead extended to husband and wife or widow or widower having care of a minor child. Gen. Code 11738 (R. S. 5441).

There never was, nor is there now, any exemption existing in favor of a single person, so that a creditor may sequester all of the personal earnings of such a person. So that it is plain that the provision requiring a demand in writing for the excess over and above ninety per cent of the personal earnings can only apply to cases where it is sought to reach the ten per cent of the earnings of married men. In this class of cases the rule of practice adopted in this court is uniform that such demand is a prerequisite to obtaining jurisdiction. It follows that this ground for discharge is not well taken and is overruled.

Another ground for a discharge of the attachment is that the return does not show service upon the agent of the railroad company in accordance with the statute. Gen. Code 10266 does provide that it must be left with the president, etc., or managing agent, if a corporation or with any regular ticket or freight agent of a railroad company. The return shows it to have been left with "the agent of the within named company, in Columbus, Franklin County." I am of opinion that this is a sufficient substantial compliance with the statute, although it would be much better to follow the statute strictly.

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It is also urged as an objection that "the nature of plaintiff's claim" has not been set forth in accordance with the statute. The affidavit states that the action is for board, lodging and washing. That seems to be sufficient in the affidavit, although it would require more facts to be stated in the bill of particulars.

An objection is made that the affidavit does not state that liability was incurred in Franklin county, and hence is violative of Gen. Code 10253. This section does provide that: "No proceedings in attachment shall be had to garnishee the salary or wages of an employe of a railroad company, by reason of his nonresidence except before a justice or on account of his being a nonresident of the county in which his liability was incurred."

The affidavit does fail to state that the liability was incurred in Franklin county. The presumption can not be indulged in that this liability was incurred in Franklin county, because the rule is that in courts of limited jurisdiction such as justices courts, all the facts requisite to confer upon it the jurisdiction must be averred and proved. Counsel has called attention to a form covering this requirement in Swan's Treatise (22 ed.) p. 399.

The principle expressed in *Leavitt v. Rosenberg*, 83 Ohio St. 230 [93 N. E. Rep. 904], would seem to apply and require that the affidavit should contain an averment of every essential required by statute. This makes it imperative upon the court to hold the affidavit insufficient. This ground of motion is, therefore, sustained.

It is claimed that the person deputed to serve the process shall be one who possesses the qualifications of an elector of the township in which the justice issues the process. Gen. Code 1732 provides that a justice may, on request of a party, specially depute a discreet person of suitable age, not interested in the action, to serve process.

Gen. Code 1733 provides that the person so deputed shall have the authority and be subject to the obligations of a constable. It is argued that as Art. 15, Sec. 4 provides that no person shall be elected or appointed to any office in this state,

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unless he possess the qualifications of an elector, the person appointed to serve the process in this case was improperly appointed because he was not a resident of the township.

A number of Ohio decisions are cited to show that, under the law, the person deputed by the justice to serve the process is an officer within the meaning of the constitution.

An officer is one who exercises in an independent capacity, a public function in the interest of the people by virtue of law; *State v. Jennings*, 57 Ohio St. 415 [49 N. E. Rep. 404; 63 Am. St. Rep. 723], upon whom is devolved the performance of independent statutory duties, which, to a certain extent, involves the exercise of part of the sovereignty of the state. *State v. Coon*, 26 O. C. C. 241 (4 N. S. 560).

The identity of an officer is to be determined by the functions that belong to it in law. *Kirker v. Cincinnati*, 48 Ohio St. 507 [27 N. E. Rep. 898].

As an officer is one "who performs the duties of that office." *Hamlin v. Kassaffer*, 15 Ore. 456 [15 Pac. Rep. 778; 3 Am. St. Rep. 176].

Emolument is a usual but not a necessary element to constitute an office. *State v. Kennon*, 7 Ohio St. 546; *State v. Anderson*, 45 Ohio St. 196, 199 [12 N. E. Rep. 656].

Art. 15, Sec. 7 of the constitution provides that every person chosen or appointed to any office of this state, before entering upon the discharge of its duties, shall take an oath to support the constitution, and also an oath of office.

The appointment of the constable is under Gen. Code 1732 and 1733 (formerly R. S. 603 and 604) as before stated. If it be concluded that a special constable appointed by virtue of the above sections be an officer within the meaning of the constitution, then it must appear that he was an elector.

Gen. Code 1733 contemplates that "for the service, execution, and return of such process," the "persons so deputed shall have the authority and be subject to the obligations of a constable."

Gen. Code 1732 and 1733 were a part of the act passed

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March 14, 1853, regulating the jurisdiction and procedure before justices of the peace, and of the duties of constables in civil cases. This act contained 15 articles and 223 sections.

Article 14 containing the two sections involved was entitled general provisions. Article 13 of this enactment related to constables and their duties. Gen. Code 3331-3345 and Gen. Code 1732, 1733 were all a part of this article.

The plan of selection of constables is disclosed by this article. The same provisions are now found in Chap. 5 of the General Code, except that Gen. Code 1732, 1733 are now found in another part of the code.

First it is contemplated that constables shall be elected biennially (Gen. Code 3327). In case of a vacancy by death, removal or nonacceptance and a vacancy occurs, the township trustees shall appoint a person to fill the vacancy.

Second it is provided (Gen. Code 3331) that a justice of the peace may appoint constables for special purposes in certain cases. And at the request of a party, and on being satisfied that it is expedient, a justice may specially depute a discreet person of suitable age, not interested in the action, to serve process (Gen. Code 1732), and for the service, execution and return of such process, a person so deputed shall have the authority and be subject to the obligations of a constable.

In these cases where persons are appointed to fill a vacancy, or where the constable is appointed for a special purpose, when there is no constable in the township, or if the regular constable is disabled, or the constable is a party to the suit, or where the constables are unable to perform the duties required of the office, it is required that the persons appointed shall take oath as in other cases.

In Gen. Code 1732, 1733, the special deputation is made at the request of a party and for the service of process in the particular cases. The only requirement made by such special appointment is that he shall be a discreet person of suitable age, and that he shall have the authority and be subject to the obligations of a constable.

Under the definitions above given, and according to the

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statute under which the special constable was appointed, in the service of the particular process, he is performing, for the time being, the duties of the office of constable by virtue of law. The obligations of a constable, during the period of his engagement, are by law imposed upon him. He is, therefore, a special constable, and a special officer.

An elector is one who resides in the state for one year next preceding an election, and who also resides in the county, township, or ward, in which he resides. Art. 5, Sec. 1, Const.

An elector is a person possessing the qualifications fixed by the constitution, and duly admitted to the privileges secured, and in the manner prescribed by that instrument. *O'Maherty v. Bridgeport*, 64 Conn. 159 [29 Atl. Rep. 466]; *Beardstown v. Virginia*, 76 Ill. 34; *Bergevin v. Curtz*, 127 Cal. 86 [59 Pac. Rep. 312]; *State v. Tuttle*, 53 Wis. 45 [9 N. W. Rep. 791].

The requirement of the statute that he shall have the authority and be subject to the obligations of a constable means to impose upon him the same responsibility, and the same requirements provided by the constitution and the laws of the state. These are that he shall be an elector of the township in which the justice who appointed him resides and officiates. That he should take an oath as do regular constables and others who are specially appointed under Gen. Code 3329-3332 seems clear. This is an obligation imposed upon other regular constables. Whether he shall give an original bond, for each service as is required by regular constables, or whether the justice and his sureties are to be held liable for any neglect of duty or illegal proceedings on the part of such constable appointed by him under Gen. Code 3333, *Dummick v. Howitt*, 40 Ohio St. 646, may not be so easily determined.

To be subjected to the obligations of a constable ought to be so construed as to require that either a bond, or the obligation of the justice who appoints him, and his sureties, under Gen. Code 3333, shall be responsible for any neglect of duty or illegal proceedings by him.

It certainly is contrary to the spirit, intent and purpose of the law that parties should institute attachment proceedings in

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the township where none of the parties reside, and have their own special constable appointed who does not reside in the township, and is not an elector thereof, and has no responsibility other than himself, as a regular or general practice.

This practice, and the course pursued in this case, is on principle and law not desirable nor legal. Being pursued regularly it constitutes an abuse of the apparent discretion which is conferred on the justice by virtue of Gen. Code 1732. When a party requests the appointment of a special officer for the service in the particular case, the justice must be satisfied that it is expedient to make the appointment, and this discretion should be exercised in limited cases, and not carried into general practice. By holding that the person appointed shall be an elector of the township will take away the opportunity for an abuse of discretion in a certain way. When there are regularly elected and qualified and acting constables in a township, special appointment of special constables under Gen. Code 1732 ought not to become the practice. It ought to be the exception. The fact that the law provides that no fee is to be taxed for his services in the costs makes it evident that a practice of having a special constable appointed under this statute will tend to show that such special constable may have a special interest in the suit different from the regular constable who will demand the regular fees. These are some of the reasons which may be advanced in favor of a restrictive rule such as is here laid down.

And the motion to discharge the attachment is sustained on the further ground that the proof shows that the constable appointed to serve the process in this case was not an elector of the township.

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BUILDINGS—COUNTIES—MANDAMUS.

[Hamilton Common Pleas, May 17, 1912.]

STATE EX REL. GREEN ET AL. V. ROBERT E. EDMONDSON, AUDITOR.

STATE EX REL. GREEN ET AL. V. HAMILTON CO. (COMRS.)

1. County Auditor is Recording Officer of County Building Commission and Mandamus Lies to Compel Action.

The recording officer of a commission to build a new courthouse, as intended by Gen. Code 2342, is the county recorder or a deputy appointed by him; hence, mandamus will lie to require him so to act, notwithstanding Gen. Code 2409, previously enacted, makes a conflicting provision for appointment of a clerk for the board of county commissioners instead of the auditor.

2. Mandamus Does Not Lie to Compel Members of County Building Commission to Vote at Election of Officers.

A county building commission created pursuant to Gen. Code 2333 et seq., in the absence of a different provision prescribed, will be governed in the conduct of its business by ordinary methods and parliamentary rules; failure of county commissioners to attend and vote at meetings of the building commission will not subject them to mandamus unless such refusals relate to participation in business requiring an affirmative vote of five members fixed by Gen. Code 2342.

[Syllabus approved by the court.]

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Dudley V. Sutphin, Albert Bettinger and Thos. B. Paxton, Sr., for relators.

Pogue, Campbell & Groom, Pros. Attys., for respondents.

HUNT, J.

The demurrers to the petitions in each of the above cases were heard together and will be so considered. Both are mandamus cases and involve the construction of the statutes providing for the appointment of a "building commission" to build courthouses and other county buildings, the first case being against the county auditor and the second against the members of the board of county commissioners.

The petition in the first case alleges that the relators, James A. Green, Thomas W. Allen, Braxton W. Campbell and George F. Dieterle, are citizens of Cincinnati and taxpayers of Hamil-

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ton county; that on February 21, 1912, they were duly appointed by the common pleas court as members of a "building commission," of which the three members of the board of county commissioners were *ex-officio* members, which commission was charged with the duty of building a courthouse and jail for Hamilton county, and that they have duly qualified as such; that on March 22, 1912, a meeting of said building commission was held at the office of the county commissioners; that the defendant, who was and is the duly elected and qualified auditor of the said county, was requested to act as clerk or secretary of said commission and keep a "full and accurate record of all proceedings of said commission," as provided by Gen. Code 2342; that on March 29, 1912, the defendant declined said request and refused and has ever since refused to so serve, claiming that it would not be legal for him so to do; that such refusal seriously interferes and prevents the carrying out of the objects for which the commission was created. A writ of mandamus is prayed for commanding the defendant to act as such clerk or secretary.

The petition in the second case sets up the character and the appointment of the relators, and that the defendants, M. P. Scully, H. H. Lippelmann and Stanley Struble are the duly elected and qualified commissioners of Hamilton county; that on March 22, 1912, the relators met with the defendants at the office of the county commissioners and attempted to proceed with the performance of their duties and particularly attempted to effect a temporary and permanent organization of said "building commission" by the election of a president or chairman or presiding officer and of a vice president or vice-presiding officer; that said defendants and each of them refused to participate in any proceeding relating to a temporary or permanent organization of said commission and refused to vote for the election of a president or chairman, or presiding officer, or vice president or vice-presiding officer for said commission; that on March 26, 1912, a subsequent meeting was held at which the relators and the defendants were present, and said defendants again refused to participate in said proceedings and have ever since refused so to do, claiming that one of their members,

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Stanley Struble, who was president of the board of county commissioners, was by virtue of his office president of said "building commission"; that such act of the defendants is unlawful and their said refusal seriously hinders and prevents the carrying out of the objects for which the commission was created. A writ of mandamus is prayed for commanding the defendants to participate in the proceedings relating to a temporary and permanent organization of said commission and compelling defendants to vote for a presiding officer and vice-presiding officer.

An alternative writ was issued in each case, and the defendants in each case have filed demurrers to the petition.

Before considering the legal question raised by the demurrers in these cases, it would not be irrelevant to consider some facts of common knowledge.

Prior to the general election in November, 1908, the commissioners of this county adopted a resolution declaring the necessity of a new jail building and of the levying of a tax for such purpose. The question of the levying of such tax was submitted to the people at such general election and a vote in favor of such levy was polled. The county commissioners, assuming that they were authorized to proceed, caused plans of such jail building to be in part prepared, but before proceeding further, they were advised that Gen. Code 2333, providing for the creation of a building commission, was applicable. Thereupon a certificate of the result of such election was certified to the court of common pleas and such court on January 9, 1911, appointed William Griffith, George Schott, Michael Devanney and John E. Bruce to act in connection with the county commissioners as a "building commission" for the building of such jail. Such building commission entered upon their duties, and the west half of the square bounded by Main, Sycamore, Canal and North Court streets, having been acquired by the county commissioners for such jail, plans and estimates of such jail were prepared; but the necessity of a new courthouse becoming manifest, and the legislature of Ohio having at last passed an act permitting the much desired change of the canal to a boulevard, the jail commissioners by resolution recommended the

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building of a new courthouse with a jail as part thereof and the acquiring of the east half of said square bounded by Main, Sycamore, Canal and North Court streets for use in connection with the west half already acquired, and the present courthouse lot, for such building. Having called for and having obtained an expression of opinion by the bar association, the civic organizations and various citizens of the county in regard thereto, said jail commission asked the county commissioners to take the action necessary to build such new courthouse and jail building combined, and decided to postpone any further action on their part in the building of a separate jail building until the county commissioners could act. The county commissioners in pursuance of such action of jail commission declared the necessity of a new courthouse building with a jail as part thereof and ordered the question of the issue of bonds for such purpose in the sum of \$2,500,000 to be submitted to the people at the general election in November, 1911. The vote was in favor of the issue of such bonds and, in due time thereafter, the court of common pleas in accordance with Gen. Code 2333, appointed James A. Green, George F. Dieterle, Thomas W. Allen and Braxton W. Campbell to act with the county commissioners as a building commission for the building of such courthouse with a jail as part thereof. Various civic organizations of the city requested that electors be appointed as members of the commission who would agree to serve without compensation. The court secured such persons and made the appointment in connection with a declaration of such persons to so serve. The latter commission is commonly known as the courthouse commission. The jail commission has taken no further action, and in doing the various things which in effect precluded them from proceeding with the building of the jail, they were manifestly animated by an unselfish regard for the public good, because by their action the appointed members of such commission precluded themselves, in a large part at least, from that compensation to which they would have been entitled under the law if they had proceeded with the building of the jail.

During all this time Mr. Stanley Struble was one of the

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county commissioners, and is now president thereof, and *ex-officio* a member of both the jail and the courthouse commissions. To his efforts to a large extent, in connection with the public-spirited conduct of the jail commissioners and other citizens, must be attributed the fact that a new county building containing a new courthouse and jail is now possible and probable in the near future.

There is no question but that the general authority to acquire land for, and the erection and repair of courthouses, jails, etc., is lodged in the county commissioners under Gen. Code 2419, subject to certain conditions as to the vote of the people; where the building is to cost more than \$15,000, Gen. Code 5638; or where the repair thereof costs more than \$10,000, Gen. Code 5645; and certain restrictions as to the approval of plans, Gen. Code 2348, and methods of contracting, Gen. Code 2353, 2354, 2364, and that upon compliance with the statutory conditions they have the right to issue bonds for such purpose, Gen. Code 2434.

- Subsequent to the passage of the acts of which Gen. Code 2419-2348 were a part, Gen. Code 2333 together with Gen. Code 2334-2344, in their original form as the act of April 18, 1904 (97 O. L. 111), was passed. Not by way of amendment or supplement to any prior act, but as a separate and distinct act with a separate and distinct title, to-wit: "An act to provide for a commission for building courthouses." It is not claimed that the amendment of March 4, 1906 (98 O. L. 53), affects the question now under consideration. As to the changes made by the code, it is a general rule that changes in arrangement or phraseology made in a general codification or revision of the statutes, do not change the legislative intent as expressed in the original acts, unless such change is clear and certain. The work of the codifying commission was adopted by the legislature and enacted as a general code, but the duty and powers of the codifying commission were prescribed by the act of April 2, 1906 (98 O. L. 221), although they did not report for several years. They seem to have exceeded their instructions in the insertion of the final clause of Gen. Code 2338, making the chapter relating

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to the erection of public buildings applicable to such commission after the Supreme Court in the case of *Mackenzie v. State*, 76 Ohio St. 369 [81 N. E. Rep. 638], had rendered a decision to the contrary. That, however, does not affect the application of the general rule to the present case. The building commission act in Sec. 1 provides that:

“When the county commissioners of any county have determined under and by authority of the statutes of the state of Ohio to erect a courthouse which shall cost to exceed \$25,000 and after the question of issuing the bonds of such county for the construction of said courthouse or other county building, has been submitted to a vote of the electors of the county and said question has been determined by said electors in the affirmative, said county commissioners shall within thirty days after said election has been held and the results thereof determined, apply to the judge of the court of common pleas for said county, who shall appoint four suitable and competent freehold electors of said county, not more than two of whom shall be of the same political party, who shall in connection with the county commissioners, constitute a building commission and who shall serve until the completion of said courthouse, as contemplated herein.”

The conditions precedent to the operation of said act according to its terms were two: first, when a courthouse was to be erected which would cost more than \$25,000; second, when the question of the issuing of bonds for the construction of the courthouse or other county building has been approved by the vote of the electors.

If the building is not to cost more than \$25,000, or if bonds are not to be issued for such purpose, but the money therefor is to be raised without the issue of bonds, apparently such act does not apply and such seems to have been the view originally taken by the county commissioners in regard to the jail building.

The two conditions, however, existing, to wit, a cost of more than \$25,000, and to be paid for by the issue of bonds, the act requires the creating of a “building commission” for the

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building of a courthouse or other county building, and defines the powers of such commission—prescribes their duties and operates as an exception to the general statutory provisions applicable otherwise to such particular subject-matter.

The Supreme Court in *Mackenzie v. State, supra*, decided that the method of building a courthouse by a building commission created under the act was independent of the general provision of the statutes applicable to the building of a courthouse by the county commissioners alone, whatever may be the effect of the subsequent insertion of the last clause of Gen. Code 2338 by the codifying commission. This independence is not in any mere method by the county commissioners but in the agency of the people (same case p. 374). The independence of said building commission is not affected by the requirement of the General Code, that they are to be governed by the provision of the chapter relating to the erection of public buildings. On the contrary, such clause is a recognition and acceptance of their independence, as established by the case of *Mackenzie v. State, supra*, because if for the purpose of building a courthouse the building commission were merely a changed form of the body known as the county commissioners, or the appointed members were simply auxiliary to the county commissioners as claimed, such provision of the General Code would have been entirely unnecessary, the county commissioners without such provision being governed by the provisions relating to the erection of public buildings—Gen. Code 2362.

The building commission by Gen. Code 2338, 2340 and 2341, is given the power to approve and adopt plans, drawings, estimates, etc. If the building commission is appointed to build a courthouse or jail, Gen. Code 2348 becomes inapplicable as being in conflict with special statutory provisions pertaining to such approval. If a commission is appointed to build an infirmary, Gen. Code 2349 becomes inapplicable. Similarly as to children's homes, Gen. Code 2351, and as to any other county building, the approval of the plans of which are otherwise provided for by prior or general statutes. The only sections of the act which have been cited as requiring the building commission

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to do something which might inferentially be considered as being an act of the board of county commissioners, considering such board as simply enlarged for the purpose of constituting it a building commission, are Gen. Code 2341 and 2342, which require that the votes upon certain resolutions shall be "by yeas and nays, recorded on the journal of the county commissioners," and that "full and accurate records of all proceedings of the commission shall be kept by the county auditor upon the journal of the county commissioners."

If the building commission was simply the board of county commissioners enlarged by the inclusion therein of the appointed members as auxiliaries or otherwise when the appointed members were meeting with the county commissioners, these provisions would be unnecessary, because already provided for by Gen. Code 2406. There is no legal or physical impossibility or difficulty in the journal of the county commissioners being used as the journal of the building commission. In fact, there is some reason for so doing, because the building commission being a temporary body, if a certification of their minutes be required before or after said commission ceases to exist, Gen. Code 2407, which provides that, "it shall be duly certified by the president and clerk and shall be received as evidence in every court in the state," if applicable to the building commission, would provide statutory evidence of the proceedings of the commission. The "it" is the record of the proceedings of the county commissioners provided for by Gen. Code 2406 and 2407, and any incongruity in the president and clerk of the county commissioners certifying to the record of the proceedings of the building commission is more of an argument in favor of the inapplicability of Gen. Code 2407, 2409 and the other sections pertaining to the organization of the county commissioners, than in favor of the mere designation of a continuous county record as the place for the record of the proceedings of the building commission, eliminating the independent existence of the building commission otherwise clearly contemplated by the statutes specifically applicable to their duties and method of doing business.

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The record of the proceedings of the county commissioners by Gen. Code 2407 when the board is not in session is by said section required to be kept in the office of the auditor. Gen. Code 2409 provides for the appointment by the county commissioners of a clerk in place of the auditor, who by Gen. Code 2566 is otherwise their secretary, but makes no change in the provision as to where this record of the proceedings of the board of county commissioners shall be kept. So that constructively, at least, such record when the board is not in session is kept in the auditor's office. There is, therefore, no impracticability in such record book being used by the auditor in recording the proceedings of the building commission, especially as the members of the county commissioners, being members of the building commission, are not to be in session when the building commission is in session. In view of the recognized practice in courts and other legal bodies of dividing up their journals into different parts so that work may be done upon all such parts at the same time, it is admitted that no inconvenience will arise by reason of a part of the journal being used by the county commissioners and part by the building commission.

Gen. Code 2341 and 2342, originally part of the building commission act, and Gen. Code 2409, a part of the chapter pertaining to the county commissioners, are as follows:

Gen. Code 2341. "Resolutions for the adoption or alteration of plans or specifications, or award of contracts, hiring of architects, superintendent or other employes and the fixing of their compensation, the approval of bonds, and the allowance of estimates shall be in writing and require for their adoption the votes of five members of the commission, taken by yeas and nays recorded on the journal of the county commissioners. When signed by five members of the commission, the county auditor shall draw his warrant on the county treasurer for the payment of all bills and estimates of such commission."

Gen. Code 2342. "Full and accurate records of all proceedings of the commission shall be kept by the county auditor upon the journal of the county commissioners. He shall carefully preserve in his office all plans, drawings, representations, bills

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of material, specifications of work and estimates of costs in detail and in aggregate pertaining to the building."

Gen. Code 2409. "If such board finds it necessary for the clerk to devote his entire time to the discharge of the duties of such position, it may appoint a clerk in place of the county auditor and such necessary assistants to such clerk as the board deems necessary. Such clerk shall perform the duties required by law and by the board."

The commissioners of Hamilton county have availed themselves of Gen. Code 2409 and have appointed a clerk to take the place of the auditor as their secretary, and it is argued that by reason thereof said clerk should perform the duties specifically enjoined upon the auditor under Gen. Code 2341 and 2342. In addition to the fact that the building commission act is a later act and charges such duties upon the auditor specifically and not upon the secretary or clerk of the board of county commissioners, and the further fact that Gen. Code 2409 is by its terms and context applicable only to the duties of the auditor in connection with the proceedings of the county commissioners, Gen. Code 2409 also contemplates that such duties of the clerk shall be such as to require him "to devote his entire time" to such duties, leaving no time for him to act for the building commission. The legislature therefore provided that the auditor should act as recording officer of the building commission. For these additional duties he can adequately provide by the appointment, if necessary, of a deputy under Gen. Code 2563.

The recording officer of the building commission is therefore the county auditor, or a deputy appointed by him for such purpose.

The building commission and the board of county commissioners, whatever names may be applied to the two bodies or entities, by reason of difference in their constituent members, all of equal authority, are different bodies, or boards or entities, and as such in so far as not otherwise specifically provided by statute, should and have therefore the right to conduct their business in the ordinary way in which a separate body consisting of seven members charged with a great public duty and en-

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trusted with the expenditure of several millions of public money and empowered to determine questions of permanent and great importance to the community, would and should conduct their proceedings, so that a full, accurate and orderly record could be kept by the auditor of their proceedings. No method has been suggested or can be suggested for accomplishing these results, except the ordinary parliamentary methods which involve a presiding officer and recording officer.

The statute designates a recording officer, to wit, the auditor. The general statutes provide for an accounting officer and a disbursing officer, but make no provision for a presiding officer. The building commission must, therefore, in some proper way, designate such presiding officer.

If the acts of the building commission were merely ministerial in character, the concurrence of a mere majority, except where the statutes otherwise provide, would be the action of the commission without such concurrence being at a meeting of the members as the commission. But as the duties of the commission involve the exercise of judgment and discretion, a meeting of the commission at which all members shall be actually or constructively present, is necessary in order that there may be full consultation and discussion, after which each member might exercise his best judgment before action. This makes a meeting necessary, 23 Am. & Eng. Enc. 368; *McCortie v. Bates*, 29 Ohio St. 419, 422 [23 Am. Rep. 758]; *State v. Wilkesville Tp.* 20 Ohio St. 288, 293; *Merchant v. North*, 10 Ohio St. 252, 258.

An orderly meeting so conducted that the auditor can properly perform his duty to record the proceedings is equally necessary.

Such being the powers of the building commission and the duties of the auditor as its recording officer, should a writ of mandamus be issued in the cases at issue?

The duty of the auditor being clear and absolutely necessary to the commission in the performance of its public duties, a writ should issue in the first case requiring him to attend in person or by deputy and record the proceedings of the commission.

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The building commission has not attempted to perform any of its duties except pertaining to its necessary organization. The commission consists of seven members, each member having equal power and authority. The commission itself is charged with certain duties involving the exercise of judgment and discretion by each of its members. The statute does not specifically provide for its necessary organization. The general rule applicable to boards, commissions and similar bodies or entities of a definite membership therefore applies, unless the statute otherwise specifically provides, to wit, that a quorum consists of a majority of its members, and that such quorum, due notice having been given of the time and place of meeting to all members, can exercise the powers of the commission; and further, that a majority of such quorum is the action of the body or commission.

If the meeting is held at the proper time and place and after statutory notice has been given, or if the statute does not provide for the notice, then after reasonable notice, and if members refuse to attend, unless their absence makes a quorum impossible, or if they attend or refuse to vote, such refusal to attend or to vote does not preclude the vote of the majority of those voting upon the motion or resolution from being the action of the commission, even though such majority is less than a majority of the members of the entire commission. Meachem, Pub. Off. Sec. 572; *Merchant v. North*, *supra*; *State v. Wilkesville Tp.* *supra*; *State v. Green*, 37 Ohio St. 227.

Under such rules, all the members of the commission having been present and there being no claim that the county commissioners refused to attend any necessary meeting, the relators, consisting of a majority of the commission, have themselves full power to organize the building commission, even though the county commissioners refuse to vote upon such organization. The reason of their refusal if persisted in, is and would be immaterial.

The four relators, therefore, unless they divide equally, which is not alleged, are not precluded from electing a president or presiding officer, nor from taking any other action not otherwise provided for by statute and necessary to a proper organiza-

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tion. If the county commissioners refuse to vote upon any resolution requiring the affirmative vote of five members, or if after due notice, such county commissioners refuse to attend any meeting at which such resolution is to be voted upon, then a writ of mandamus would properly issue compelling them to attend, and by their vote exercise the discretion vested in them by law, in accordance with general principles and rules laid down in the following cases: *Attorney General v. Lawrence*, 111 Mass. 90; *Commonwealth v. Ayre*, 5 Pa. Dist. Rep. 575; *State v. Baker Co. (Comrs.)* 22 Fla. 29; *Wampler v. State*, 148 Ind. 557 [47 N. E. Rep. 1068; 38 L. R. A. 829].

However, it is not alleged, and certainly will not be presumed that the county commissioners will not perform their full duty in attending the meetings of the commission, or in the conscientious exercise of the duty to vote or act upon any matter upon which the statute requires the affirmative vote of five members of the commission.

The refusal of the county commissioners to vote upon questions of mere organization, upon the facts alleged in the petition, does not therefore interfere with the performance by the building commission of its statutory duties, and the relators neither as taxpayers nor as members of the commission have the right to require the county commissioners to do that which is unnecessary, nor that which if not done would not be prejudicial. *State v. Buckham*, 2 Circ. Dec. 526 (4 R. 246).

The writ of mandamus prayed for in the second case will therefore be refused.

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BONDS—FRAUD—INSURANCE.

[Montgomery Common Pleas, January 13, 1911.]

LEGLER, BARLOW & Co. v. UNITED STATES FIDELITY & GUARANTY Co.

Representations by Employer in Application for Fiduciary Bond as to Fidelity of Employee Constitute Warranty, the Breach of Which Vitiates Bond.

Representations by an employer applying for a bond securing him against loss through larceny or embezzlement of a bookkeeper, that the said bookkeeper's accounts were audited on a certain day and were found correct in every particular, amount to a warranty as to the correctness of said accounts, and in a subsequent action upon the bond a plea of good faith in making such representations, with the explanation that prior embezzlements were concealed by said bookkeeper by means of fraudulent entries and were not known at the time the representations as to his fidelity were made, is demurrable where the bond provides that "if there is any statement made by the employer that is false the bond shall be void."

[Syllabus approved by the court.]

DEMURRER to the first defense.

D. B. Van Pelt, for plaintiff.*Rowe, Matthews & James*, for defendant.**BROWN, J.**

This matter has been pending in court for several years and was recently brought to the attention of the court by oral argument, on December 24 last, upon demurrers to the reply to the first defense, to the reply to the amended second defense, to the reply to the third defense, and to the reply to the fourth defense. The original action was brought to recover upon a guarantee bond issued by the defendant to the plaintiffs to indemnify them against any loss which should accrue by any act of a certain bookkeeper amounting to larceny or embezzlement.

The answer sets up five defenses and the second defense was amended by the filing of what is termed in pleading an amended second defense. To these separate defenses a reply is filed to each one specifically, and a demurrer is now interposed

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for the consideration of the court to each of the first four of these replies, no demurrer being filed to the reply to the fifth defense.

The first defense in the answer admits the formal parts of the petition and alleges that plaintiffs in their written declaration of July 26, 1904, for the purpose of inducing the defendant to bond the said bookkeeper, stated among other things that the bookkeeper's accounts were audited on July 1, 1904, and were correct in every particular; and also that his authority in reference to funds was to pay any bills such as freight and other little local bills, and that the means employed to ascertain the correctness of his accounts was by daily balances, his accounts to be examined daily, and that there was not at that time any shortage due from him to the plaintiffs; that it was further provided in said bond that if the plaintiffs' statements shall be found in any respect untrue, the bond shall be void. The defendant then avers that the accounts of the bookkeeper were not correct on the first day of July, 1904, and that they showed at that time a large shortage and that he was in fact a defaulter at that time; that the bookkeeper was in the habit of paying out large amounts of money for other than freight or little local bills; that the dealings and handling of cash by the bookkeeper were not examined and balanced daily, and it was not true that the bookkeeper was not short in his accounts July 27, 1904; and by reason of these facts the bond issued upon him was null and void, and therefore denies any liability.

To this first defense the plaintiffs file a reply, to which the demurrer is filed, admitting the signing of the declaration as alleged and setting forth the employers' declaration in full; it admits also that the plaintiffs signed what is termed an "employers' statement," and of the eighteen questions and answers eight are not set forth in full together with the conclusion of such statement wherein it is stated that the answers are to be taken as conditions precedent and as the basis of the bond applied for. Among other questions and answers was the thirteenth—"When were his accounts last examined? Answer: July 1st, '04;" and the 14th—"Were they at that time in

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every respect correct and proper securities on hand to balance? Answer: Yes." It then admits that the bond contained the following provisions: "If the employers' written statement hereinbefore referred to shall be found in any respect untrue this bond shall be void."

The plaintiffs then further admit that prior to July 26, 1904, the said bookkeeper without their knowledge had embezzled certain sums of money as shown by the exhibit attached to the petition; that on and prior to July 1, 1904, he had so embezzled the said sums, but the plaintiffs aver that the bookkeeper had concealed these facts by false entries, so that the accounts kept by him appeared on the books to be correct in every particular; and they aver that in making the statements above referred to, Mr. Barlow, who signed the same, acted in good faith and in the honest belief that they were in all respects true and without any knowledge that the bookkeeper had embezzled as aforesaid, and that the plaintiffs were reasonably vigilant in the examination and supervision of his accounts.

The demurrer to this reply to the first defense reaches the vital point in the determination of the litigation, and the matter has been very ably and fully argued by counsel in their oral argument.

The counsel for the fidelity company insist that these statements made by Mr. Barlow as to the conditions past amount to warranties of fact, and that the statements as to what will be the future condition amount to promises which must be fulfilled strictly to the letter; while counsel for the plaintiffs contend that these statements were made in good faith, and that the absence of any fraudulent intent to deceive would excuse them in event the statements were found not to be true.

The defendant relies upon the case of *Livingston & Taft (Tr.) v. Deposit Co.* 76 Ohio St. 253 [81 N. E. Rep. 330], the first syllabus of which reads:

"Written statements made by a corporation accompanying an application to a bonding company for a bond guaranteeing the honesty of employes, which statements relate to the past

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conduct of such employes in their service as such, and are intended to and do enter into the contract and become the inducement in part for issuing of the bond, are in the nature of warranties, and their falsity in any material particular will defeat recovery on the bond for the delinquency of such employes."

It is contended by counsel for the plaintiffs that this case does not apply to the case in hearing, on account of the gross negligence and carelessness and violations of the statutory law on the part of the officers of the building association of which Blodt, the embezzler, was then secretary; that it is not a parallel case because the bond given to indemnify private citizens like the plaintiffs against their employes would find a different application of the rule. I have given the case cited very careful consideration, but it is certainly evident from the opinion of the court given on page 267, that there was no intention of the court to modify the law as to warranties. The opinion was rendered by Judge Spear, all the other judges concurring. He says, p. 267:

"Lest the foregoing comment respecting the negligence of the loan company be misconstrued as indicating that negligence is the basis of our judgment, we add that negligence is but an incident. It is not intended to hold that mere negligence on the part of the guarantee may afford a defense but to hold that a warranty binds the warrantor, and that the breach on his part constitutes a defense to an action on the bond."

I have taken the opportunity to look up the question from other authorities not cited by counsel. Richards, Ins. Law p. 656:

"The written statements accompanying application for a guaranty bond usually amount to warranties and the doctrine of warranty then applies."

A warranty in insurance is a stipulation or agreement on the part of the insured in the nature of a condition. An expressed warranty is a particular stipulation introduced into the written contract by the agreement of the parties. An expressed

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warranty must be strictly complied with and the assured is not permitted to allege any excuse for noncompliance that the risk was not thereby affected, since the parties have agreed that the stipulated fact or act shall be the basis of the contract.

A breach of warranty vitiates an insurance, though the insured made the warranty without the knowledge of its falsity. 2 Bouvier's Law Dictionary, p. 1213.

The answers in applications for insurance are warranties. It is not important that the party making the warrant really believed in its entire truth; if it be false it voids the contract. *Clemans v. Supreme Assembly*, 131 N. Y. 485, 488 [30 N. E. Rep. 496; 16 L. R. A. 33].

It is claimed by counsel for the plaintiff that the law of warranty is that if a party makes a positive representation, knowing it is not true, or has no reasonable ground to believe it is true, or makes it recklessly, it is a warranty, no matter whether the party intended it so or not, and that the statements of Mr. Barlow fall under this head.

This is not the correct definition of warranty. A warranty is a statement of the fact that is made by one party to a contract to another which is to induce him to enter into the contract, and the party making the statement, no matter how honest he may be, no matter how thoroughly he may believe in the truth of that statement, takes the risk of its being false. If he knows it to be false, then there enters into it fraud upon which the contract may be attacked, but when one makes a warranty, when he asserts a fact in a positive way, he knowing that it is going to be a warranty, and as the bond in this case states "if there is any statement made by the employer that is false the bond shall be void," that brings it home to the person making such statement that he takes the risk and chance of its being false, and his honesty and diligence are no excuse for making a statement which is proven subsequently to be false.

The rule of construction by the courts is always to strictly construe the contract of insurance in favor of the insured, and the natural sympathy of judges is with the parties indemni-

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fied by the insurance companies; but when the lawmakers of the state permit such contracts to be made and such statements and applications to be signed and do not provide that statements made in good faith and with honest intention shall not be considered warranties, the courts have no discretion and must decide the matter according to the law and the facts as found.

Therefore, in this case, it will be necessary to sustain the demurrer to the reply to the first defense, which is accordingly done. This being determined and going to the essential part of the entire case, it is not necessary to consider the demurrers to the replies to the other defenses.

GAMING AND GAMBLING—SEARCH WARRANT.

[Hamilton Common Pleas, December, 1910.]

H. E. ENGELHARDT, ADMR. v. F. W. KUMMING.*1. Magistrate not Liable for Value of Gambling Devices Taken Under Search Warrant and Kept by Him or Destroyed.**

A magistrate is not liable for the destruction of certain slot machines taken under a search warrant for gambling devices issued pursuant to Gen. Code 13482, nor can their value be recovered from him upon his refusal to give possession thereof where the devices are kept by him by virtue of Gen. Code 13496, the law not recognizing property rights in devices and instruments used for gambling.

2. Search Warrant Proceeding is One In Rem as Distinguished from Proceeding for Fine and Imprisonment.

A search warrant proceeding under Gen. Code 13482 et seq. is one "in rem"; a magistrate having acquired thereby possession of certain gambling devices and having acquired jurisdiction of the person owning or having possession of the instruments in question and having found, on evidence adduced, that such devices were used for gambling purposes, it is immaterial that such owner or possessor did not appear for trial at the hearing as in case of a prosecution for fine and imprisonment.

3. Money Found in Slot Machines Properly Appropriated to Payment of Cost in Search Warrant.

Money found in slot machines, taken under a search warrant issued under authority of Gen. Code 13482, for gambling devices, may be appropriated by a magistrate in part payment of costs accrued in the proceedings.

[Syllabus approved by the court.]

*Dismissed, no op., *Kumming v. Englehart*, 87 O. S. 000; 57 Bull. 464.

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MOTION for new trial.

H. E. Engelhardt and *W. W. Bellew*, for plaintiff.

Fulton & Woost, for defendant.

O'CONNELL, J.

The plaintiff herein is the administrator of the estate of Adolph Engelhardt, deceased, who was a resident of Hamilton county, Ohio. The decedent had been the keeper of a saloon or roadhouse, who had been arrested and his premises searched under and by virtue of certain affidavits, a warrant and search warrant issued by the mayor of Home City, of this county. The plaintiff seeks to recover from the mayor, the defendant herein, the value of certain slot machines, to wit, the sum of \$245, which were found in the possession of Engelhardt and were taken under and by virtue of the search warrant and, after a trial by the mayor, were ordered destroyed. They were not destroyed, but have been withheld from the plaintiff by the defendant as being gambling devices. The plaintiff, as administrator, demanded possession of the slot machines, which demand being refused, he brought suit to recover their value.

The plaintiff also, for a second cause of action, seeks to recover the sum of \$5.91—the amount of money in the slot machines at the time of the seizure. This money had been devoted by the mayor to the payment of court costs.

At the trial in this court the plaintiff offered in evidence the machines themselves, and also the record of the proceedings before the mayor, to wit: his docket entries and copies of the original papers. This record shows that the mayor found at the hearing before him that the machines in question were gambling devices.

The evidence offered by the plaintiff at the trial in this court as to the manner of operating the machines, together with the mechanism and operation of the machines themselves as they were exhibited and shown to the jury, shows that they are gambling devices.

The record of the proceedings before the mayor shows that his proceedings were regular and lawful in every respect. R.

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S. 7120 (Gen. Code 13482) authorizes a magistrate to issue a search warrant for gambling devices. After he found from the evidence that they were gambling devices, the mayor had the right to order them destroyed, but did not do so. He appears to have followed the provisions of R. S. 7125 (Gen. Code 13486), in that he "kept them in his possession until the accused be tried or the claimant's right is otherwise ascertained." Engelhardt, the owner, died, and no proceedings of any kind were had against him under the warrant of arrest.

Under the evidence adduced at the trial herein the plaintiff has no right or recovery against the mayor for either destroying or withholding possession of the slot machines in question. As the mayor had these chattels in his possession legally, his action in ordering them destroyed was lawful, if in his judgment the evidence justified such finding. And this is true, although the defendant did not appear for trial at the hearing, because the record shows that the mayor had acquired jurisdiction of the person of Engelhardt, the owner, as well as having taken possession of the machines. The action before the mayor was not a proceeding by way of fine or imprisonment against Engelhardt, the owner. It was a proceeding under a search warrant against these instruments which were alleged to be used for gambling purposes. Evidence was heard concerning the operation of the slot machines regardless of who claimed to be the owner. This was a proceeding well known to the law, it being a proceeding "*in rem*" or "against a thing" as distinguished from "against a person."

The law does not throw its protecting arm about gambling devices and gambling instruments, nor does the law recognize any property rights existing in gambling devices for the use of such devices and instruments are subversive and destructive of the best interests of society. The plaintiff should have prosecuted proceedings in error were he dissatisfied with the proceedings before the mayor. He can not maintain his first cause of action in view of the facts disclosed by the mayor's court records and the evidence produced in this court.

For his second cause of action the plaintiff seeks to recover

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the sum of \$5.91 contained in the slot machines at the time of the seizure. The evidence offered by the plaintiff himself shows that this \$5.91 had been applied by the mayor towards the payment of the costs of the proceedings before him. But the plaintiff contends that this action of the mayor was unlawful and he had no right to so appropriate the money. However, other evidence which the plaintiff offered, to wit, the transcript of the proceedings before the mayor, shows that the costs which had accrued in these proceedings before the mayor amounted to over \$30. There was no abuse of discretion on the part of the mayor, such as to render him liable for the repayment of the money, in interpreting the statutes to permit him to apply this sum towards payment of the costs of the proceedings under the search warrant. The evidence before him disclosed that it was money won at gambling. Even if this action were erroneous the plaintiff has not shown that the error was prejudicial to him, because the lien for the court costs accruing in the case against the slot machines is far in excess of the amount of money which came into the mayor's hands as contained in the gambling devices, to wit: \$5.91. It is only error which is prejudicial that gives ground for a reversal.

At the conclusion of the plaintiff's evidence the court directed a verdict for the defendant. The plaintiff filed a motion for a new trial. This motion should be overruled.

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QUIET TITLE.

[Cuyahoga Common Pleas, August 17, 1912.]

AUGUSTA C. LOCKWOOD ET AL. v. GRANT T. WHITTLESEY ET AL.

Debt of Heir to Ancestor not Sufficient to Divest Interest in Ancestor's Estate or Support Cohair's Action Quia Timet.

An inherited title to a share in ancestral real estate is not divested by the fact that such heir is indebted to the ancestral estate; hence, a coheir in possession, without recourse to legal action to subject the title and interest of such debtor heir to payment of his indebtedness to the estate, cannot maintain an action under Gen. Code 11901, to quiet their title in the inherited portion of the debtor heir, especially if the effect thereof would be to prevent a diligent creditor of the debtor heir from levying on his interest in the estate.

[Syllabus approved by the court.]

Carpenter, Young & Stocker, for plaintiffs.

Wing, Myler & Turney, for defendants:

Stare decisis et non quieta movere. *American Mort. Co. v. Hopper*, 64 Fed. Rep. 553 [12 C. C. A. 293]; *Haskett v. Mazey*, 134 Ind. 182 [33 N. E. Rep. 358; 19 L. R. A. 379]; *White v. Denman*, 1 Ohio St. 110; *Perkins v. Clements*, 1 Patt. & H. (Va.) 141; *Bates v. Relyea*, 23 Wend. (N. Y.) 336; *Palmer v. Mead*, 7 Conn. 149; *Farwell v. Railway Corporation*, 4 Mete. (Mass.) 49 [38 Am. Dec. 339]; *Howard v. Railway*, 26 Fed. Rep. 837; *Towle v. Forney*, 14 N. Y. 423.

Where a court has considered and determined a point in case, its conclusion becomes the law of that case until reversed by the appellate court. *Bane v. Wick*, 6 Ohio St. 13; *Walbridge v. Manufacturing Co.* 5 Dec. 203 (7 N. P. 430); *Wakelee v. Davis*, 44 Fed. Rep. 532.

Death of ancestor after bankruptcy of heir makes inheritance part of new estate of latter from which creditors since bankruptcy must be satisfied. 2 Loveland, Bankruptcy (4 ed.) Sec. 508; Collier, Bankruptcy (8 ed.) p. 302.

Collateral attack. *Nichols v. Smith*, 26 N. H. (6 Fost.) 300; *Morrill v. Morrill*, 20 Ore. 96 [25 Pac. Rep. 362; 11 L. R. A. 155; 23 Am. St. Rep. 95; 12 Am. & Eng. Enc. Law (2 ed.)

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147; *Parsons v. Weis*, 144 Cal. 410 [77 Pac. Rep. 410]; *Harter v. Shull*, 17 Col. App. 162 [67 Pac. Rep. 911]; *Kaptolani v. Atchery*, 14 Hawaii 651; 17 Am. & Eng. Enc. Law (2 ed.) 848; *Spencer v. Spencer*, 31 Ind. App. 321 [67 N. E. Rep. 1018; 99 Am. St. Rep. 260]; *Alexander v. Nelson*, 42 Ala. 462; *Campbell v. Jones*, 52 Ark. 493 [12 S. W. Rep. 1016; 6 L. R. A. 783]; *Vassault v. Austin*, 36 Cal. 691; *Mulford v. Estudillo*, 23 Cal. 94; *Hughes v. Cummings*, 7 Col. 138 [2 Pac. Rep. 289]; *Rawles v. People*, 2 Col. App. 501 [31 Pac. Rep. 941]; *Sears v. Terry*, 26 Conn. 273; *Jordan v. John Ryan Co.* 35 Fla. 249 [17 So. Rep. 73]; *Lee v. Patten*, 34 Fla. 149 [15 So. Rep. 775]; *Walker v. Mortgage Co.* 114 Ga. 862 [40 S. E. Rep. 1010]; *Archer v. Guill*, 67 Ga. 195; *Vickery v. Scott*, 20 Ga. 795.

Action to quite title does not lie, 32 Cyc. 1325; *Heath v. Bank*, 32 S. W. Rep. 778 (Tex. Civ. App.); *Byles v. Rowe*, 64 Mich. 522 [31 N. W. Rep. 463]; *Virginia Coal & Iron Co. v. Kelly*, 93 Va. 332 [24 S. E. Rep. 1020]; *Warren v. Realty Co.* 156 Fed. Rep. 203; *Wilmore Coal Co. v. Brown*, 147 Fed. Rep. 931; *Mawhorter v. Armstrong*, 16 Ohio 188.

FORAN, J.

The petition filed in this case is a petition *quia timet* or to quiet title. It was tried upon an agreed statement of facts which, so far as is essential to the determination of the real question involved, discloses that one Harriet T. Hanford, a widow, resident of Cuyahoga county, Ohio, died intestate May 19, 1910, seized in fee simple of the real estate described in the petition. She left as her sole heir at law the plaintiffs, Augusta C. Lockwood, a sister, the plaintiffs, Augusta L. Whittlesey and Charles H. Whittlesey, and the defendant Grant T. Whittlesey, children of a deceased sister. At the time of the death of the decedent, Harriet T. Hanford, the defendant Grant T. Whittlesey was indebted to her for moneys loaned to him by the decedent in a sum largely in excess of his interest in her estate. The decedent left no other real estate except that described in the petition. She left more than sufficient personal property to pay all debts due against her estate. The defendant Grant T. Whittlesey is wholly insolvent, and a nonresident of

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Ohio; he has paid no part of his indebtedness to the decedent's estate, and the same is uncollectible. An administrator was duly appointed and qualified, but no action has been taken by him or by the plaintiffs in any court or by any legal process to subject the estate or interest of Grant T. Whittlesey in this real estate to the payment of his indebtedness to the estate of the decedent.

Shortly after the death of the decedent, the plaintiffs took possession of said real estate, collected rents accruing therefrom, and are still in possession thereof.

The original petition was filed November 15, 1911. A demurrer was filed to this petition, sustained, and the amended and supplemental petition, upon which the case is at issue, was filed May 16, 1912.

After the filing of the original petition, November 15, 1911, the defendant Augustus M. Weber and the Commercial National Bank obtained judgments in this court against the said Grant T. Whittlesey in an amount largely in excess of his interest in the decedent's real estate.

On behalf of one of the defendants, the Commercial National Bank, a levy was made upon the premises described in the petition, an order of sale issued, and the land is being now advertised for sale to satisfy said judgments or the judgment liens against his said interest.

On January 17, 1907, the defendant Grant T. Whittlesey filed a voluntary petition in bankruptcy in, and was adjudged a bankrupt by, the district court of the United States for the northern district of Ohio, eastern division.

On November 11, 1907, he filed his petition for discharge, which was subsequently, on March 13, 1912, withdrawn.

He has not filed an answer in this case; and the withdrawal of his petition for discharge, after this action was commenced, would seem to indicate that he is not to be considered in the light of an adverse defendant.

In view of these facts and under these circumstances, it seems to us that the only question presented to the court is: Can this action to quiet title be maintained? An action to quiet

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title surely involves the proposition that there is a title to be quieted. It can not be said that the action may be invoked to create a title that does not exist, and then quiet the title thus sought to be created. It is admitted that the plaintiffs have absolute title, by inheritance, in common to five-sixths of this property; and it is further admitted, by counsel for plaintiffs, that if Grant T. Whittlesey was not indebted to the decedent, he also would have acquired complete title to one-sixth of the decedent's real estate.

In this opinion all reference to the plaintiffs' title will be understood as relating to their alleged title to the other one-sixth of this real estate, which the defendants Weber and the Commercial National Bank claim is owned by and the title in Grant T. Whittlesey.

Briefly stated, the proposition is this: A dies intestate seized of certain real estate. B and C are his sole heirs at law, but C, at the time of A's death, owed him more than his interest in decedent's real estate is worth. Does this fact, of itself, without recourse of any kind to legal action, divest C, at the instant of A's death, of his inherited title to a half interest in the lands of A, and at the same instant invest that interest or title in B?

If the indebtedness of C, *ipso facto*, at the moment A dies, divests C of his interest and title and invests that interest and title in B, without legal action of any kind, then B could maintain an action to quiet his title. But if the indebtedness of C does not, *ipso facto*, destroy and extinguish his title and interest in the lands of A, then B can not maintain an action to quiet his title, and for the simple reason that he never had a title to quiet.

The action is brought under Gen. Code 11901, which provides that "an action may be brought by a person in possession, of real property, by himself or tenant, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse interest." That is, a person in possession of real estate, by himself or tenant, may bring an action against another "who claims an estate or interest therein adverse to him," that is, adverse to the plaintiff's

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estate or interest. The very language of the statute implies and presupposes that the plaintiff has an interest or estate in the lands. It will not be contended for a moment that a man may lawfully take possession of his neighbor's land, and, because of the mere naked possession, maintain an action to quiet title. He may bring the action, of course, but to bring an action and maintain it or prevail in it involves the right to the relief demanded. Mere naked possession of real estate does not confer title, nor does possession ripen into title unless it is adverse and continuous for twenty-one years; hence, before this kind of an action can be maintained, something more than mere possession must be shown and proven. If the statute itself was not clear on this point, it is made so by Gen. Code 11903 and 11904, which relate to the remedy or rule of pleading in such cases. Gen. Code 11903 provides that it will be sufficient if the plaintiff pleads or states in his petition that he has a legal estate in the lands; and Gen. Code 11904 provides that it will be sufficient if the defendant, in his answer, denies generally "the title alleged in the petition." That the words "estate or interest," used in Gen. Code 11904, are synonymous with title, is quite apparent.

By Sec. 14 of the Chancery act of 1831, 29 O. L. 81, it was provided that "any person having legal title and possession of lands" might bring this action. This section was somewhat modified from time to time, until 1870, when it was amended so as to read substantially as the first paragraph of Sec. 11901 of the general code now reads. Volume 67 O. L. 116 (Sec. 557 Swan & Critchfield Statutes, page 1118). The statute was further enlarged in 1893 to include the right to maintain the action by a person out of possession, provided he had an estate or interest in remainder or reversion in the lands in controversy. 90 O. L. 226. As thus amended, the statute is now known as R. S. 5779 or Gen. Code 11901. Before the amendment of 1870, the Supreme Court of this state held, under the prior statutes, that title could not be quieted in favor of a party unless he had both possession and the legal title, and it was necessary for him to allege such possession and title in his bill and prove them at the

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hearing. *Clark v. Hubbard*, 8 Ohio 382; *Douglass v. Scott*, 5 Ohio 194. That a vendee who had not acquired the legal title could not sustain a bill of peace, since no other kind of title would suffice. *Thomas v. White*, 2 Ohio St. 540.

The words estate, interest, and title are frequently used in our statutes, but no attempt is made by statutory provision to define these terms. It seems clear that before a plaintiff can prevail in a *quia timet* action as against the world, he must show such estate, interest or title in the lands as amounts to absolute ownership. Mere naked possession in the plaintiff, in the absence of paramount title in the defendant, will entitle the plaintiff to a decree against such defendant, though it be illegal against others. *Mains v. Henkle*, 2 Dec. Re. 530 (3 W. L. M. 593). But such a decree can not be obtained against a defendant who shows a valid legal or equitable interest, estate or title in the lands superior to that of the plaintiff. Under the Chancery act of 1831, to maintain this action a plaintiff had to show legal title as well as possession. In *Avery v. Dufress*, 9 Ohio 147, the court, in answer to the question "what is real estate?" says, "If it be such an interest as can be enforced in a court of law, it is a legal interest or estate. If it be such as can only be enforced in a court of chancery, it is an equitable interest or estate"; and in *Douglass v. McCoy*, 5 Ohio 522, the court practically held that a legal estate in lands was such an interest as could be sold upon execution. Before the bill could be maintained under this act, the legal title had to be first secured in a court of law. Counsel for plaintiffs insist, however, that under the present statute the practice is so broad that the action may be instituted in any case where plaintiff claims an interest in lands and even to determine whether of right he ever had a title or color of title. Granted, but if no title is shown, how can it be quieted? The real purpose of the amendment of 1870 (Gen. Code 11901) will, we think, become apparent from a cursory consideration of the principles involved. For instance, A, to secure a debt due B, executes and delivers to him a mortgage upon certain real estate, for its full value. A really has no equity of redemp-

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tion in the land. B exercises acts of ownership in relation thereto, such as selling some of the same and allotting the balance. B never actually took possession of the land, but, by reason of his acts in relation to it, is constructively in possession. He may maintain a bill to quiet his title, without having first foreclosed A's equity of redemption. (See *Rahe, In re*, 12 Dec. 590.) Here we see that B really owned the land and had paid full value for it. Under the act of 1831, not having the legal title, he could not maintain the action. Under Gen. Code 11901 he can.

Again, D conveys certain real estate, through a trustee, to his wife, which is to be in full of all her statutory claims against his estate. The deed was not recorded, and was, by consent of the parties, afterwards destroyed. D dies intestate. The wife, notwithstanding her consent to the destruction of the deed, may elect to keep the real estate and have her title thereto quieted under Gen. Code 11901 (See *Spangler v. Dukes*,¹ 39 Ohio St. 642). This case proceeds upon the theory that the deed to the wife was in legal effect a jointure during coverture, which vested in the wife an estate in fee which was not divested by the destruction of the deed. There was full consideration and title vested in the wife; she became, in fact, the owner of the land, and if she had taken possession thereof after her husband's death, she could maintain a bill of peace, even under the act of 1831. Ownership then was essential under the old chancery act, and is still essential under Gen. Code 11901.

It would seem to be elementary that if an interest in real estate, in a given case, does not amount to absolute ownership, it is because, at the same time, there is another interest in the same land pertaining to other persons. In the case at bar, can it be said that at the death of Harriet T. Hanford the plaintiffs had an absolute and entire ownership in all the real estate in question? We think not; for the reason that at the same time there was another interest in the same land pertaining to the defendant, Grant T. Whittlesey, which interest amounts to a legal title, and may, therefore, be taken upon execution.

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It is also elementary that where one man may have the ultimate right of property in real estate, another the right of possession, a third the actual possession, each has a qualified or incomplete interest or estate in the land, which, if transferred to and merged in one person, constitutes in such person an absolute estate or fee simple. In the case at bar the plaintiffs and the defendant Grant T. Whittlesey, at the death of the decedent, each in common, had had the ultimate right of property and the right of possession in and to this real estate; and because the plaintiffs took actual possession, it does not follow that the ultimate right of property and the right of possession of Grant T. Whittlesey to one-sixth thereof was destroyed and extinguished. The words "estate or interest" in real property, as used in Gen. Code 11901, which may be quieted by petition *quia timet*, are not used in the broad sense of involving the quantity of interest, measured by duration and extent, which a person has in lands, from absolute ownership down to mere naked possession. They are rather to be taken as indicating title as defined by Coke's maxim, "*Titulus est justa causa possideri id quod nostrum est*—A title is the just right of possessing that which is our own," the lawful cause or ground of possessing that which is ours. *Arrington v. Liscom*, 34 Cal. 385; *Pannill v. Coles*, 81 Va. 383; *Merrill v. Insurance Co.* 73 N. Y. 456.

A title, then, that can be quieted means a perfect title, for having title to land means owning it. He who has possession, the right of possession and the right of property, has a perfect title. *Anderson's Dictionary*; *Shelton v. Alcox*, 11 Conn. 240, 249; *Blackstone, Commentaries* 195; 1 *Kent, Commentaries* 177, 178.

The plaintiffs have possession of the inherited interest of Grant T. Whittlesey in decedent's real estate, but we fail to see or understand how they ever acquired the right of possession and the right of property to this interest.

In the case of *Collins v. Collins*, 19 Ohio St. 468, it was held that the action could not be maintained under Sec. 557 of the code (S. & C. 1118 above cited), against persons claiming a re-

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mainder in the lands contingent upon the death of the plaintiff without issue. In the opinion in this case Welch, J., in referring to the amendment of 1870 (Sec. 557 S. & C., page 1118), which provides the action may be brought by a person in possession, by himself or tenant, without the prerequisite allegations of legal title, said: "The only effect of this provision in the code is to substitute the plaintiff's possession for the establishment of his right by trials at law. In other essentials the remedy by bill of peace remains the same as under the old practice."

Possession may give a plaintiff the right to bring the action before he has established a legal title by trial at law; but if his title is denied, he must establish it, or his action fails. The proposition is clearly stated in Bispham, Prin. of Eq. Sec. 575, where it is said: "Bills to remove a cloud from a title may be asserted in almost any case in which justice requires that the title of the party in possession should be quieted and the evidence of that title clear." To maintain this action, then, not only must the plaintiff show title in himself, but it must also appear that the adverse claim of the defendant is of no validity, but merely vexations—*ne injuste vexes*—freely vex not unjustly; or, as it has been said, there must be some apprehension of injury at the hands of the defendant by the assertion of hostile claims which have no foundation in law or fact.

In *Mains v. Henkle*, *supra*, Lawrence, J., held that Sec. 557 of the code (S. & C. 1118) extended the general equity doctrine and gave bills of peace more of the character of bills *quia timet*, thus enabling any person in possession, by himself or tenant, of real property, even by an equitable title in fee, or for a term, to maintain a petition to quiet title. It is quite apparent, therefore, that there must be a title of some kind to the real property, which the court can merge into an absolute title or a title for a term in the plaintiff, to enable him to maintain the action. The plaintiffs fully recognize this, for they assert in their petition that they are not only in possession, but "are the owners in common in fee simple" of the property described in their petition. They say their title is *feodum simplex*, a lawful

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and a pure inheritance, wholly free and clear of any qualifications or conditions, for that is what is meant by a fee simple title. A fee simple is the largest estate and the most extensive interest that can be enjoyed in land, being the entire property therein, and confers unlimited powers of alienation. 4 Kent, Commentaries 5; 1 Blackstone, Commentaries 690; *Lott v. Wyckoff*, 1 Barb. (N. Y.) 565, 577; *Jackson v. Van Zandt*, 12 Johns. (N. Y.) 169, 177. Let us test their alleged title to the land in question by this standard. Is the estate they claim, or was it at decedent's death, wholly free and clear of any qualification or condition? Suppose they undertook to deed this real estate the day the decedent, Harriet T. Hanford, died, alleging that by reason of the fact that an heir who had a one-sixth interest therein was indebted to the decedent in a sum in excess of that interest, and therefore had no estate in the land, they were sole owners thereof in fee simple; would such a deed convey absolute title in and to the land? Who would take such a deed? The filing of this petition is an admission that such a deed would not convey an absolute title. They claim they have absolute title conferring full power of alienation, and yet they want it quieted. This seems inconsistent. It seems to us that there is a vast difference between quieting their title and extinguishing the title of the defendant, Grant T. Whittlesey. Suppose the contention that the indebtedness of Grant T. Whittlesey, in excess of his interest, extinguished his title in the land is sound, there remains the contingency that the debt may be disputed and a qualifying condition interposed between the plaintiff's claim and their right to enforce it. It is true, it is admitted, the indebtedness in this case is in excess of the interest, but that does not destroy the principle involved or render it less embarrassing to the claim that the indebtedness of an heir to the estate of his ancestor, *ipso facto*, divests him of his title as heir if the indebtedness exceeds the inheritance. Take another view of the case: Suppose since the death of Harriet T. Hanford the real property involved so increased in value that the indebtedness of Grant T. Whittlesey was less than one-sixth of the value of the property? In such case he would undoubtedly still have

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an interest therein, admitting the contention of the plaintiffs to be true. It follows, then, that the most the plaintiffs can justly and legally claim is, that heirs of a decedent take their distributive shares subject to any indebtedness they may have owed, respectively, to the decedent at the time of his decease. This we understand to be the well-settled law of this state. In other words, if an heir owed the decedent, the amount found due the decedent's estate will be a legal as well as an equitable setoff against his interest in the estate of the decedent.

It is admitted that this is purely an equitable action. As a general rule, a court of equity will not entertain jurisdiction of a petition to quiet title or remove a cloud where there is a plain, adequate and complete remedy at law. This doctrine is so well established as to be elementary, and citation of authorities or precedents supporting it would be wholly superfluous.

Have the plaintiffs, or did they have, a plain, adequate and complete remedy at law? Surely it will not be denied that the administrator not only had a right, but it was his plain duty to have brought an action against Grant T. Whittlesey on his indebtedness in a court of law, obtained judgment against him, and levied upon his interest in the lands described in the petition, and sold that interest to satisfy that judgment. Suppose this had been done, such judgment obtained and such levy made, would the plaintiffs be heard to say that the lands could not be sold because the whole title was in them, and that Grant T. Whittlesey had no interest in the land? The answer to this question we think conclusive of the point or question involved. If this real estate could be sold to satisfy a judgment against Grant T. Whittlesey in favor of the estate of the decedent, it follows inevitably that the plaintiffs did not have fee simple title to the whole of the real estate at the time of the decedent's death. We believe there is no escape from this conclusion. That the indebtedness of Grant T. Whittlesey is a part of the assets of the decedent's estate, will not be denied. See Woerner, Am. Law of Admin. Sec. 71, where it is said:

"The true principle seems to be that a debt owed by an heir constitutes part of the assets of the estate as much as that

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of any other debtor, for which he should account before he should be allowed to receive anything out of the other assets."

The true rule, then, seems to be, that a debtor must account to the decedent's estate, and his interest will be subject to the payment of his indebtedness. Nor can it be said that the creditor's estate takes precedence of other creditors of the debtor heir. If this were true, the plaintiffs and the administrator could have become parties to the suits brought by the defendants, Weber and the Commercial National Bank, and prevented the order of sale from issuing, or at least availed themselves of the proceeds of such sale, and thus render the bringing of this action wholly unnecessary.

The real purpose of the rule which requires an heir of a decedent to take his distributive share subject to any indebtedness he may have owed to the decedent, is to secure equality of inheritance among all the heirs, for it has been held, "It is inequitable and at variance with the policy defined in our statutes to permit one to share in an estate which is diminished by his default and to the prejudice of those whose rights are equal to his." *Keever v. Hunter*, 62 Ohio St. 616, 619 [57 N. E. Rep. 454]. The debtor heir cannot share in the estate equally with the others until he has accounted for his indebtedness. But it will be noticed from the language used by Shauck, J., in *Keever v. Hunter*, *supra*, that the rights of the other heirs are only equal to and not greater than the debtor heir. This does not mean, therefore, that a diligent creditor of the debtor heir may not attach or levy upon the interest of the debtor heir, before that interest has been subjected by the estate or the other heirs, or before the debtor heir has accounted to the estate for his indebtedness. To hold otherwise would open wide the door to collusion and fraud.

Indeed this action is an attempt to accomplish what could not be accomplished in the suits prosecuted by the other defendants above named, or by a creditor's bill, if they had reduced their claim to judgment, a thing easily done even yet, as Grant T. Whittlesey is apparently ready and willing to confess judgment in favor of the administrator or the plaintiffs.

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Again, if there were no debts against the decedent's estate, and administration were unnecessary, the plaintiffs might bring or have brought an action in partition, and in that action subjected the interest of Grant T. Whittlesey in this estate to the payment of his indebtedness to the estate; that is, his indebtedness could be, in such case, set off against his interest in the estate or the land.

We have diligently searched for a precedent or authority *in pari passu* with plaintiffs' contention, and failed. We do not believe that a case involving the precise question here submitted has ever been decided.

For the reasons indicated, the petition will be dismissed, and the defendants given judgment for costs.

TAXATION.

[Greene Common Pleas, March 28, 1912.]

J. P. CHEW v. R. R. GRIEVE.

1. Newspaper Publisher not Manufacturer under Tax Statutes.

A publisher of a newspaper is not a manufacturer and entitled to make return and be assessed for taxation as such under Gen. Code 5385 et seq.

2. Good Will Considered in Estimating Tax Valuation of Newspaper.

"Good will" of a newspaper is an intangible element of its value to be estimated in ascertaining its tax valuation.

[Syllabus approved by the court.]

DEMURRER to petition.

Chas. L. Darlington, for plaintiff.

Frank L. Johnson, Pros. Atty., for defendant.

JONES, J.

This court is unable to agree with the contention of plaintiff that the publisher of a newspaper is a "manufacturer" and entitled to make a return and be assessed for taxation as such. Such a definition has been held in a number of cases to apply to a publisher of books, or even to a producer of stationery, or a job printer, but a distinction is made between these occupations and that of printing a newspaper. The publisher of a newspaper does not combine, refine or change the character of any raw material. He takes sheets of paper, a finished product, and by means of other finished products, type and ink, he im-

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presses characters upon the paper, which enhances its value, for the time being, at least, but it is still a sheet of paper.

In our own state as was forcibly remarked by Judge Shearer of our own circuit court, in an interesting and thorough opinion in *Tippecanoe v. Boercher*, 3 Circ. Dec. 4 (5 R. 6), we get little aid from the language of the statute in determining in any particular case, who is a manufacturer, for, as he says, "reduced to the last analysis a manufacturer is a manufacturer." In the view of this court, the enhancement in value of the plain sheet of paper, when it is covered with interesting printed matter, does not make the printer or publisher a manufacturer, more than the painter or artist who enhances the value of a canvas or a sheet of cardboard, or a board or piece of metal (all finished products in themselves) by placing on them a picture, a drawing or a sign. I am unable to find any reported decision in Ohio as to newspaper publishers, but outside the state the decided weight of authority seems to be that they are not considered as manufacturers for the purpose of taxation. For a full collection of these authorities see very full notes in *Carlin v. Assurance Co.* 57 Md. 515 [40 Am. Rep. 446]; *Engle v. Sohn*, 41 Ohio St. 691 [52 Am. Rep. 107, 109].

Outside of one federal decision, the only states that seem to have held a newspaper publisher to be a manufacturer are Utah and Louisiana. The case in the latter state, *State v. Dupre*, 42 La. Ann. 561 [7 So. Rep. 727], was decided by a divided court, and in a later case, the supreme court of that state seem to have reached a different conclusion, for it held that:

"Manufacture," in its ordinary sense, means the changing of raw material into some new and useful form. Its natural import is to produce an article, so that a thing is not usually said to be manufactured unless its form is materially changed. "A change or addition in or to the mode of use of an article already manufactured cannot be considered a manufacture, so that under a statute exempting from taxation property employed in manufactures, printing machinery by which letters and bill heads are printed on blank paper is not exempt." *Patterson v. New Orleans*, 47 La. Ann. 275 [16 So. Rep. 815],

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referred to in 5 Words & Phrases, page 4355. See also *Oswald v. Globe Pub. Co.* 60 Minn. 82 [61 N. W. Rep. 902].

The plaintiff then, being subject to the general rule, requiring his property to be assessed for taxation at its true value in money, did the board of revision adopt an improper and illegal method in ascertaining and fixing such value?

It is averred that the plaintiff's return for taxation was \$4,500, which was increased by the board, \$13,500, of which increase \$2,000 was on the machinery, materials and stock, and \$11,500 on the estimated gross annual receipts for subscriptions.

The record of the board itself simply states that the board found the actual value of plaintiff's plant, excluding real estate, to be \$18,000 and ordered it placed upon the duplicate for that sum, without reciting how that conclusion was reached.

It is also recited in the minutes of the board that the plaintiff stated that he would not take \$25,000 for his plant in question.

It is true that the income of a newspaper depends largely upon the editorial skill, and mental ability and judgment of the man who is its editor, and that the amount of such income may fluctuate largely, according to the degree with which such skill and judgment is exercised. It is also true that the "good will" of such paper is an intangible element of its value, and may be largely decreased, or almost destroyed by changes in public opinion, or sometimes in a manner difficult to account for at all. It is also true that we have no tax on incomes, professional or otherwise, and that it would be improper to, in effect, subject the skill of an editor, author, lawyer or physician to a tax, by estimating his supposed earning capacity, and taxing him thereon.

Still the proprietor of a newspaper, even if he happen to be also the editor, whose talent is responsible largely for the success of his journal, does not stand in precisely the same position as the other professional men named. He has a business as well as a profession, a business which he can sell, while they have nothing that is marketable—nothing that they can transfer to others. A successful lawyer or physician desiring to re-

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tire, could probably realize but little more on a sale than the intrinsic value of his library and fixtures, but no successful newspaper publisher would dream of selling his plant for the mere appraised value of its contents.

An old-fashioned newspaper plant publishing a popular and well established paper would probably sell far many times more than a new, modernly equipped office that had yet to gain and retain its constituency of subscribers.

Can this good will, intangible though it may be in its nature, be considered as an element in assessing the property for taxation? In this state the question has been determined in the affirmative by the highest court.

In the elaborate notes to the decision in *State Bd. of Ed. v. Goggins*, 191 Ill. 528 [61 N. E. Rep. 339; 58 L. R. A. 513], it is said on page 567:

"To the state of Ohio belongs the distinction of being the first to recognize in express terms, the taxability of good will as an element of capital stock."

The case referred to is the well-known "Nicholls' Law Case." *State v. Jones*, 51 Ohio St. 492 [37 N. E. Rep. 945]. The language of the court on page 512, is most appropriate to the case at bar.

"If by reason of the good will of the concern, or the skill, experience, and energy with which its business is conducted, the market value of the capital stock is largely increased, whereby the value of the tangible property of the corporation, considered as an entire plant, acquires a greater market value than it otherwise would have had, it cannot properly be said not to be its true value in money within the meaning of the constitution, because good will and other elements indirectly entered into its value. The market value of property is what it will bring when sold as such property is ordinarily sold in the community where it is situated; and the fact that it is its market value cannot be questioned because attributed somewhat to good will, franchise, skillful management of the property, or any other legitimate agency."

The doctrine of this case, as is well known, was approved by the U. S. Supreme Court, in *Adams Express Co. v. State*, 10

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O. F. D. 655 (165 U. S. 194) and *Adams Express Co. v. State*, 10 O. F. D. 426 (166 U. S. 185).

In the "telephone case," *State v. Halliday*, 61 Ohio St. 352 [56 N. E. Rep. 118; 49 L. R. A. 427], the Supreme Court said:

"In ascertaining the true value in money of such property in the hands of its owner, every fact or circumstance, brought to the attention of the person or officer who is charged with the duty of fixing that value, and which in its nature bears on the question, should be considered by him. One of those circumstances is the earnings or rental of such article."

The opinion in this case is too long to be quoted here, but it is replete with reasoning applicable to the case at bar.

The Supreme Court of the United States said emphatically and tersely—

"Whatever property is worth for the purposes of income and sale, it is also worth for the purposes of taxation." *Adams Express Co. v. State*, 10 O. F. D. 426.

Further citation of authorities on this proposition would seem superfluous.

If "every fact and circumstance" bearing on the question of value, including the earning capacity, which is brought to the attention of the board, is to be considered by them in fixing value, and if the selling value is the tax value, then the board had the right to consider the statement of the plaintiff that the plant earned a gross income of \$11,500 and that he would not sell it for \$25,000.

If the board found the value of the plant to be a certain amount (less than that fixed by its owner), is not that finding, unless impeached for fraud, or as palpably excessive, conclusive and not subject to review by the court. The board is charged with the duty of making this valuation; the court is not.

In *Wagoner v. Loomis*, 37 Ohio St. 571, the Supreme Court said:

"As a general rule, the decisions of officers and tribunals specially created and charged, in tax laws, with the duty of valuing property for taxation, and equalizing such valuations, are final and conclusive."

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It would seem if the board has assessed a valuation for this property, which cannot be impeached on the grounds already mentioned, that the result of its deliberations cannot be successfully attacked on account of the method by which such conclusion was arrived at—on the same principle that a correct judicial decision will not be reversed because the court gave the wrong reason for arriving at it.

The burden of proof is on the plaintiff to make out a clear cause for an injunction. *Spangler v. Cleveland*, 43 Ohio St. 526 [3 N. E. Rep. 365].

It does not seem to this court that such a case has been made out as would justify the interposition by the judicial branch of the government with the proceedings of officers specially charged with duties in the department of valuing property for taxation.

It may be remarked that if the value of the good will of this property should change hereafter, that there are opportunities offered from year to year, by which a reduction in its valuation for taxation may be secured to correspond with such decreased real value.

Some reference was made in oral argument as to whether the court had any jurisdiction to review in any way the proceedings of the board. The jurisdiction of the court to enjoin illegal taxes on the duplicate from collection, is conferred by statute, but there is also a general rule that the party complaining must exhaust his other remedies, if any, in the way of appeal or review by other taxing boards or officers before coming into court. See authorities collected in 13 Michie's Ohio Enc. Dig. p. 788, par. 4, particularly *Mitchell v. Franklin Co. (Treas.)* 25 Ohio St. 143, 158. It is difficult for this court to see what other remedy the plaintiff had in this case other than the one he has invoked, unless possibly he might have appealed to the Ohio Tax Commission under the provisions of 102 O. L. 258, Sec. 151 (Gen. Code 5617-6). See also Gen. Code 5617-3 and 5617-8. In view of the conclusion the court has reached, it is unnecessary to further discuss this proposition.

The demurrer to the petition must be sustained.

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APPEAL—TAXATION.

[Cuyahoga Common Pleas, September 28, 1912.]

**JOHN CHRIST AND ARNOLD STEVERDING, EXRS. V. CUYAHOGA CO.
(COMRS.)**

1. **No Refunder Allowed of Taxes Paid by Delinquent Tax Purchaser of Lands Previously Appropriated for Street Purposes but Negligently Allowed to Stand on Duplicate.**

Negligently placing or keeping on the tax duplicate land appropriated for street purposes after a county auditor has notice of such use constitutes a fundamental mistake, as distinguished from a clerical error, and is not an "error," the correction of which is contemplated by Gen. Code 2588; hence, county commissioners cannot make allowance by way of refund of taxes, subsequently paid thereon after certificate of purchase is issued; and particularly as to taxes paid prior to the five years next preceding discovery of the mistake for which refund is provided by Gen. Code 2590.

2. **Commissioners' Order Rejecting Demand to Refund Taxes is Judicial Function and Appealable.**

Appeal lies to an order by a board of county commissioners, allowing or rejecting a demand under Gen. Code 5764 for refund of money, paid upon a certificate of purchase at delinquent tax sale and for taxes subsequently paid thereon, such order being in the exercise of a judicial function from which a person aggrieved may appeal under Gen. Code 2461.

3. **Purchasers of Tax Title Take Land Subject to Peril Induced by Chance.**

Purchasers of land at delinquent tax sales, having the same means of ascertaining the title and listing thereof as county auditors, taking the chances induced by large penalties against the owner, purchase at their peril, make voluntary payments and, consequently, are precluded from complaining of defects overlooked by them.

[Syllabus approved by the court.]

Appeal from county commissioners.

H. G. Schaibly, for plaintiffs.

William E. Minshall, for defendants.

FORAN, J.

In 1874 one Louis Harms was the owner of two lots located on the northerly side of St. Clair street in the city of Cleveland, Ohio. These lots were each 50 feet wide and 200 feet deep, run-

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ning northerly from the north line of St. Clair street. At that time said St. Clair street was 60 feet wide. In 1874 the city, by ordinance, provided that the width of said St. Clair street should be increased to 99 feet, and to that end appropriated approximately 34 feet off the lots abutting on the northerly side of the street, leaving the Harms lots but 166 feet deep. Subsequently during the same year, 1874, Harms sold from the extreme northerly end of these lots 30 feet of land, leaving the land still owned by him 136 feet deep from the new line of St. Clair street, or 170 feet deep, measured from the old or original line of said St. Clair street. In 1875 Harms sold these lots, then only 130 feet in depth. The deeds were duly presented to the recorder of the county for transfer. The deeds, or descriptions of the lands as recited in the deeds are not before the court, but it is quite probable the lands were sold by lot number, or, if described by metes and bounds, St. Clair street was indicated as the southerly boundary of the lots. The recorder, in transferring these conveyances, took the old or original line of St. Clair street as the southerly boundary of the lots instead of the new line as widened by the city in 1874. This left a parcel of land 100 feet wide and thirty-four feet deep at the northerly end of the lots apparently still in the name of Harms. As a matter of fact this parcel of land was owned by the parties to whom Harms had made these conveyances in 1875. The taxes on this parcel of land, the land being still apparently listed for taxation in the name of Harms, became delinquent, and the same was sold at delinquent tax sale in January, 1883, to one Kelly, who paid the taxes then appearing due thereon as of record in the auditor's office, and received from the auditor the usual certificate of purchase, which certificate Kelly assigned, about a month later, to one Hill. In December, 1883, the auditor discovered that an error had been made, and refunded to Hill the money paid for the certificate of purchase at said tax sale. The auditor then, as appears by the agreed statement of facts upon which this case is submitted, made an entry "on the tax sale records of his office, on the same lines where said tax sales are recorded," in the following words: "Double entry;

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money refunded Dec. 5th, 1883." The auditor, however, did not take this parcel of land from the tax duplicate, but the same was still carried in and remained listed in the name of said Hill. In January, 1885, the taxes on this parcel of land again appeared delinquent, and it was again sold at delinquent tax sale to Valentine Christ, who paid the taxes appearing due thereon and received from the auditor the usual certificate of purchase. Christ continued to pay taxes assessed against the land until June, 1889, when he surrendered his certificate of purchase and received from the auditor a tax deed or deeds to the land, and paid the taxes thereon until and including the year 1908, the amount so paid being \$257.93. Valentine Christ died May 17, 1910, and the plaintiffs in this proceeding are his duly appointed and qualified executors. On March 11, 1911, they presented to the defendants, as county commissioners, a claim for said \$257.93, so paid by the said Valentine Christ, and asked that the same be allowed. This claim the defendants allowed for the amount originally paid and the taxes for the years 1904, 1905, 1906, 1907 and 1908, being for five years including the year 1908, the last year Christ paid taxes on the land, the amount so allowed being \$62.25. The balance, \$195.68, was disallowed. From this allowance or decision of the county commissioners an appeal is filed in this court, by virtue of Gen. Code 2461, which provides that if a person is aggrieved by the decision of the county commissioners in any case, such person may, within fifteen days thereafter, appeal to the next court of common pleas. Counsel for the defendants claim that under the facts in this case the appeal does not lie, for the reason that "the right of appeal is limited to matters in which the commissioners are vested with judicial function." It is true that where the duty is purely ministerial and in no way involves judicial discretion, the remedy, if there be one, is by mandamus, and the court of common pleas would have no jurisdiction by appeal in such case. *Noble Co. (Comrs.) v. Hunt*, 33 Ohio St. 176. A judicial act is an act done by a member of the judicial department of government, in construing the law, or applying it to a particular state of facts presented for a de-

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termination of the rights of the parties thereunder. *Smith v. Strother*, 68 Cal. 194 [8 Pac. Rep. 852]. In a ministerial act there is no dependence on the exercise of judgment as to the propriety of doing the act, while a judicial act involves the exercise of judgment and discretion. We think there can be no doubt but that the commissioners were called upon, in determining whether this claim should be allowed or disallowed, to exercise both judgment and discretion; and for the consequences of their decision, whether well or ill judged, they are not collectively or personally liable; and therefore their action was not purely ministerial and was *quasi* judicial.

Counsel for appellants claims the right to recover the amount originally paid for the certificate of purchase, received by Christ at the time, January, 1885, of the tax sale and all taxes thereafter paid by him, under and by virtue of Gen. Code 5764. This section, as it read during all of these transactions, provided that if the taxes charged on any land are regularly paid and the land is erroneously returned delinquent and sold for taxes, the sale shall be void, "and the money paid by the purchaser at such tax sale shall be refunded to him." Evidently this section of the statute, before the act of revision of February 14, 1910, provided only for refunding money paid for the certificate of purchase, that is, the money paid at the time of the delinquent tax sale. No other construction can be placed upon this statute as it read during the time these transactions took place. The amount so paid, \$6.12, was allowed by the commissioners, as appears by the appeal or petition of plaintiffs. This allowance will not be disturbed, although, in view of the lapse of time, some twenty-three years, intervening between payment and demand for refunder, it is questionable whether it should be allowed; but as no complaint is made by counsel for defendants in that respect, it will stand.

Secondly, counsel for the plaintiffs insist that the whole amount of the tax paid by Christ, including the amount paid for the certificate of purchase, should be refunded, and that authority for so doing is conferred upon the county commissioners by Gen. Code 2588, 2589 and 2590.

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Gen. Code 2588 provides that the auditor, from time to time, shall correct all errors which he discovers in the tax list and duplicate, first in the name of the persons charged with the tax or assessment; second, in the description of the land or property; third, when property exempt from taxation has been charged with taxes; fourth, in the amount of the taxes or assessment charged. This section as amended January 16, 1873 (70 O. L. 10 and 11), provided that the auditor should correct all errors which he discovers "in the tax list and duplicate, either in the name of the person charged with the tax or assessment, the description of the land or other property, or in the amount of such taxes or assessments." It will be noticed that the words "or when property exempt from taxation has been charged with taxes," did not appear in the statute at that time. This statute, as it then stood, was construed by our Supreme Court in *State v. Montgomery Co. (Comrs.)* 31 Ohio St. 271. In that case it appears that for five years prior to the beginning of the action taxes were annually levied and collected on certain real property, situated in Montgomery county, which, as a pure public charity, was not subject to taxation under the law of this state. Application was afterwards made to the county auditor to draw his warrant upon the county treasurer in favor of the relator for the amount of taxes so paid. The auditor refused to comply with the request, and a writ of mandamus was prayed for, commanding the auditor to issue a warrant to the treasurer for the amount so paid. The Supreme Court held that "the errors named in the statute are clerical merely, but the error complained of by the relator is fundamental. The question, whether specific property is or is not subject to taxation, was not, by this section of the statute, submitted to the judgment of either the auditor of the county or the board of county commissioners," and the writ was therefore refused.

This holding by our Supreme Court resulted in an amendment to the statute by the legislature, by which amendment the words "or when property, exempt from taxation, has been charged with taxes" were included. In this case the auditor

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placed upon the tax duplicate or listed for taxation property which, under the law, was exempt from taxation; and, as will be seen, it was held that this was not one of the errors named in the statute, but that it was a fundamental error. In other words, a mistake occurring in an original or primary act is not clerical but fundamental. *Mitchell v. Hamilton Co. (Comrs.)* 10 Dec. Re. 628 (22 Bull. 294). That is, the statute was intended to empower the auditor to correct mere clerical errors, but did not give him power to correct a mistake made as an original or primary act.

In *Sandheger v. Hamilton Co. (Comrs.)* 8 Dec. Re. 569 (9 Bull. 20), it was held that where a new building was erected on land to replace an old building which was torn down, and the value of the new building was added to the valuation, no deduction being made for the old building, that the county commissioners were not authorized under this statute to refund the tax which had been paid for several years on the excessive valuation. To state the case more clearly, the valuation of the land or premises before the erection of the new building included, of course, the valuation of the old building, and when the new building was erected the value of this new building was simply added to the valuation as it stood before the new building was erected; and, as will be seen, this was held to be a mistake occurring in an original and primary act, and was therefore fundamental and not clerical, and was not an error for which the county commissioners might make an allowance for the excessive taxation.

In *State v. Brewster*, 6 Dec. Re. 1210 (12 Am. L. Rec. 544; 11 Bull. 39), it was held that where facts did not appear upon the face of the return, but must be determined by the auditor by investigation, this section of the statute did not apply.

There are many other decisions to the same effect, and it seems that the principle to be deducted from these decisions is, that if the direct object of the inquiry before the commissioners is to determine the existence, kind and value of certain property, any error therein would be fundamental. *Mitchell v. Hamilton Co. (Comrs.) supra*. It seems to be well-settled by

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the adjudicated cases that the errors which the auditor may correct by virtue of Gen. Code 2588 are errors of bookkeeping or of copying, and that the statute does not afford a remedy or permit a refunder in cases where the errors are fundamental in character.

In *Barney & Smith Mfg. Co. v. Montgomery Co. (Comrs.)* 11 Dec. Re. 790 (29 Bull. 366), it was held that "the errors which it is contemplated by this section the auditor may discover and correct, are such as may be detected by an inspection of the books and papers in his possession or under his control, and are merely clerical errors."

The statute does not apply to errors of law, but to bookkeeping. *Brooks v. Lander*, 13 Dec. 634.

In the case of *Ives v. Hamilton Co. (Comrs.)* 6 Dec. Re. 1079 (10 Am. L. Rec. 306; 6 Bull. 697), it was held that where the city appropriated land and the taxes were afterward charged against the land so appropriated, in the name of the owner of the land before appropriation, that the error was fundamental and not clerical. We think this is a case practically in point. So also it has been held that erroneous valuation is fundamental and not clerical. *Tatem v. Hamilton Co. (Comrs.)* 10 Dec. Re. 514 (21 Bull. 317).

Gen. Code 5398 and 5401 provide that the county auditor has power to correct false returns made by persons in listing property for taxation, and to add a penalty therefor. If in correcting such false returns he makes an error of judgment in his additions, and taxes are paid thereon, no refunder can be had under or by virtue of Gen. Code 2588, *State v. Brewster, supra*, and for the reason that such mistake of judgment is not a clerical error—a mistake in writing or the erroneous writing of one thing for another. Such error of judgment would be a mistake or an error in action. The errors contemplated by this section, (Gen. Code 2588) relate to inaccuracies due to oversight or accident, or to discrepancies between what is thought to be true and what really is true, that is, something different from what was intended. A mistake differs from a clerical error in this, that a mistake is an erroneous act or omission arising from

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ignorance or confusion; or, as Pomeroy defines it, a mistake in law is an erroneous conception that influences the will and leads to action. We think it elementary that if a mistake is due or owing to the neglect of a legal duty, such neglect of a legal duty deprives the error of the character of a mistake, in the legal sense. Therefore, keeping or placing the land sold to Christ on the tax duplicate was not a clerical error, and no refunder should be allowed for taxes or assessments paid after the certificate of purchase was given to Christ.

This holding may seem to work a hardship, but it must be remembered that persons purchasing lands at delinquent tax sales do so, in large measure, at their peril. Such purchases have in them many elements of chance, which are taken by such purchasers because of the large penalties assessed against the owner, for the benefit of the purchaser, when the owner seeks to redeem the lands. Besides, it may be said that the purchaser of lands at a delinquent tax sale has the same means of ascertaining everything relating to lands, the title thereto, the listing thereof, and the taxes and assessments levied thereon, that the auditor and treasurer has, and he ought not to be heard to complain if he purchases blindly and without investigation. As a general rule, when a man pays taxes, the law regards the payment as voluntary, and no recovery can be had of the taxes so paid, unless by express statutory provision. Any other rule would cause chaotic confusion in determining the amount of revenue required and in the collection and distribution of taxes and assessments from year to year.

From the agreed statement of facts upon which this case was submitted, it does not appear that when the appropriation of the land owned by Mr. Harms, for the purpose of widening St. Clair street, was made by the city, the auditor had any knowledge of that fact. The statutes in this state nowhere provide, so far as we are able to ascertain, that it shall be the duty of a municipality to notify the auditor of the county when it appropriates land for street purposes, or to furnish him with a description of the land appropriated. From inquiry made by the court at the auditor's office, it seems that the practice in this

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county is for the city clerk to send to the auditor a copy of all ordinances providing for the appropriation of land for municipal purposes; but these copies of ordinances so furnished the auditor are not even certified by the municipality as being correct. If this be true, it is difficult to understand how the county auditor, in listing lands for taxation, can determine from the books and records in his office whether any of the lands in the county have been appropriated for municipal purposes; and it is therefore quite evident that the original error in this case, occurring in 1874, was a fundamental error and not a clerical error. Evidently the attention of the auditor, however, was called to the mistake in December, 1883, by Hill who then owned or held the certificate of purchase given Kelly, and the money paid therefor was refunded to Hill. It appears that the auditor at the time, upon the discovery of this mistake, made an entry on the tax records of his office on the same lines where said tax sales are recorded, to the effect that it was a double entry, and the money was refunded December, 1883. The auditor at this time had knowledge of the mistake, and it was his plain duty to take this parcel of land from the tax duplicate; this he failed to do. Can it be said that this negligent omission to perform a plain duty was such an error as is contemplated by Gen. Code 2588? We think not. Instead of an error, it was gross and negligent failure of duty, for which the auditor, as a ministerial official, might be held liable. The errors mentioned in this section of the statutes are errors in the description of lands, errors in the amount of taxes or assessment assessed, or errors in the names of the party charged with taxes. The negligent omission or failure of the auditor to take this parcel of land from the tax duplicate evidently does not fall within this provision of the statute. The other provision of the statute relating to property exempt from taxation is especially provided for and was inserted in the statute, as we have seen, because of the decision in *State v. Montgomery Co. (Comrs.) supra*, already referred to.

We therefore hold that the county commissioners had no authority, under Gen. Code 2588, to make any allowance to the

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executors of Christ for any taxes paid by Christ, after he obtained a tax title to this property or after he received his certificate of purchase; but inasmuch as the county commissioners made an allowance for the five years preceding and including the last year for which taxes were paid, and counsel for the county do not ask that this allowance be revoked, it will not be disturbed.

Gen. Code 2590 provides that "no taxes or assessments shall be so refunded except as have been so erroneously charged or collected in the five years next prior to the discovery thereof by the auditor."

Where a city had appropriated land by condemnation proceedings, and the owner continued to pay taxes on the same, he not having notified the auditor to take such lands off the tax duplicate, such payment of taxes is not an error on the part of the auditor, but is due to his own failure in not having the correction made, and no refunder of taxes will be allowed. *Ives v. Hamilton Co. (Comrs.) supra.*

It appears from the records in this case that Christ paid taxes upon land, which the county treasurer had no right to sell, for twenty-three years; and further, that he received a tax title deed. The law provides that the holder of a certificate of purchase may surrender the same two years after receiving it, and receive from the auditor a tax title deed. Before this deed is furnished, however, it is the duty of the county surveyor to furnish the auditor or the purchaser with a description of the land named in the certificate of purchase. If the surveyor had performed his duty in the premises, and actually surveyed the land in question, the mistake would have been discovered. If he failed to do this, and made a description for Christ from the description in the certificate of purchase itself, this would have been such negligence on his part as might have made him liable personally to Christ. In any event, it is difficult to conceive how Christ could have continued to pay taxes on another man's land for twenty-three years without being guilty of gross laches, which would, we believe, estop him from making any claim during his lifetime; and if he could not legally assert

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claim for a refunder during his lifetime, surely his executors will not be heard to do so.

If the plaintiffs were entitled to recover at all, they could only recover for such taxes or assessments as have been erroneously charged and collected for the five years preceding the discovery of the error. *Barney & Smith Mfg. Co. v. Hamilton Co. (Comrs.) supra*; *Hagerty v. State*, 7 Circ. Dec. 88 (14 R. 95). But, as we have seen, the plaintiffs can only recover if the error is clerical merely; and are not entitled to recover if the error was fundamental, as already indicated. We believe from the facts in this case that if there was error, it was fundamental; but, as a matter of fact, we hold that the failure of the auditor to take this land from the tax duplicate in December 1883, was a negligent mistake, occurring in the original and primary act of the auditor, and can in no sense be said to be clerical.

For the reasons indicated, the allowance or decision of the county commissioners will be affirmed and the appeal dismissed.

RAILWAYS.

[Hamilton Common Pleas, June 18, 1912.]

STATE OF OHIO v. PITTSBURGH, C. C. & ST. L. RY.

1. Local Dirt Trains are Engaged in Traffic Requiring Automatic Couplers.

A railway company moving dirt from one point on its line to another, for the purpose of constructing a yard or fill, constitutes "traffic" within the meaning of Gen. Code 8950, requiring automatic couplers on all cars used in moving state traffic.

2. Forfeitures Recoverable under Railway Coupler Acts.

The use of railway cars equipped with automatic couplers as specified by Gen. Code 8950, except that they will not couple by impact, subjects the company to the forfeitures as prescribed by Gen. Code 8965, relating to couplers out of repair, rather than to the forfeiture prescribed in Gen. Code 8954, relating to cars which have not been equipped with couplers.

John V. Campbell and Charles A. Groom, for plaintiff:

Robert Ramsey, for defendant:

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CUSHING, J.

This action is brought by the state of Ohio against the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, a corporation, to recover the sum of \$1,100 as a penalty for the violation by the defendant company of an act of the legislature of Ohio, passed March 19, 1906 (98 O. L. 67), for using eleven cars in state traffic contrary to the provision of the act in question. The state filed a petition. The defendant filed an answer and an amended answer. The pleadings state the facts, and it is sought by a ruling of the court to determine the question of law involved, assuming the facts to be as stated in the pleadings.

The pleadings present two questions for determination:

First, is the moving of dirt from one point on the defendant company's road to another for the purpose of making a yard or a fill, traffic within the meaning of the act of the legislature above referred to?

Second, does the act of the defendant company as stated in the pleadings come within the provisions of the act of March 19, 1906, and what effect, if any, did the enactment of that law by the legislature have upon another act of the legislature of Ohio passed May 12, 1902?

The act of the legislature of the state of Ohio, passed March 19, 1906, reads as follows:

Sec. 2. "That it shall be unlawful for any such common carrier to haul, or permit to be hauled or used on its line, any locomotive, car, tender, or similar vehicle used in moving state traffic, not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

Section 6 of the same act provides a penalty of \$100 for each and every such violation to be recovered in an action against the offender.

Act 95 O. L. 659, Gen. Code 8962:

"It shall be the duty of the inspector to inspect the couplers. * * * He shall also on discovering a defective coupler * * * immediately report the same to the superintendent of the road * * * and to the agent thereof." * * *

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Gen. Code 8963:

"Any road whose superintendent or station agent shall receive such notice * * * shall cause the same to be immediately repaired." * * *

Gen. Code 8965:

"Any railroad which fails to comply with any of the provisions of this act shall forfeit and pay to the state of Ohio, the sum of \$25 for each day such defective coupler * * * is kept in use contrary to the provisions hereof."

The two acts in question are inconsistent in that the act of 1902 provides for inspection of couplers with a penalty of \$25 a day for each day a car is used when the said couplers are out of repair, while the act of 1906 provides a penalty of \$100 for the defendant to haul or permit to be hauled or used on its line a car not equipped with automatic couplers.

It does not seem necessary to discuss at any length the question made by the defendant company as to whether the hauling of dirt from one point to another on the company's road is traffic within the meaning of the acts quoted. The acts in question were passed for the purpose of protecting the operatives of railroads, and while traffic in its broader sense is transportation of goods along the line of travel, as a road, railway, canal or steamboat route, it could hardly be said that because the company was moving dirt from one point to another on its line, that that act was any different from hauling grain from one station on the company's line to another. The apparent purpose for which the acts were passed was the protection of the operatives of the railroad, and the material with which the trains were loaded could hardly make any difference.

The state claims in the case at bar that under the above section of the statute the defendant company is liable to the state in the sum of \$100 for each time a car is hauled in traffic when the same is not equipped with couplers as provided in the act of 1906, or if the cars are so equipped and the same are in such condition that they do not couple automatically by impact and can not be uncoupled without the necessity of men going between the cars, then the company is liable in the sum above stated. The defendant claims that it is not liable under the

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facts stated in the petition in this case; that the acts above quoted were passed to accomplish an entirely different purpose; that the act of 1902 was intended to and did give the state supervision over all couplers on all railroad cars and provided a penalty for each day a car was used with a coupler out of repair, and that the act of 1906 specified the kind of couplers with which all railroad vehicles should be equipped and provides a penalty for each time a car or vehicle is hauled when not so equipped, and therefore it would be liable for the penalty under the act of 1906 only in case of a failure to equip its cars as provided in that act, and that it would be liable under the act of 1902, if those couplers were out of repair or in such condition that they could not be used as provided in that act.

One of the fundamental principles of the construction of statutes is that the court shall determine and declare the intention of the legislature in passing the act or acts in question, that statutes shall be so construed that each shall, if it can be done, be given the effect the legislature intended it to have, and that in arriving at that intention the language used shall be given its plain, ordinary meaning.

In passing upon what appear to be conflicting statutes the Supreme Court of Oklahoma has this to say:

"It is the duty of the court to endeavor to reconcile the statutes whenever it is possible to do so in order that the legislative intent may be, as far as possible, effective, and to support the theory as fully as may be done, that as a body of revised laws adopted at the same time they are of equal force and effect, and all intended to stand with as little interference as possible, of judicial interpretation, and it is the duty of courts to endeavor to harmonize the various parts of the statute with each other. One part of the statute will not be allowed to defeat another, if, by any reasonable construction, the two may be made to stand together."

In expressing the views of the courts text-writers have this to say:

"Statutes should be construed according to the intention of the legislature which passed the act. If the words of the statute are of themselves precise and unambiguous, then no more

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can be necessary than to expound these words in their natural and ordinary sense. The words themselves do in such case best declare the intention of the legislature." Sutherland, Stat. Constr. Sec. 389, citing *South Park (Comrs.) v. Bank*, 177 Ill. 234 [52 N. E. Rep. 365].

It is also the law that:

"Laws are presumed to be passed with deliberation, and with full knowledge of all existing ones on the same subject. And it is, therefore, but reasonable to conclude that the legislature, in passing a statute, did not intend to interfere with or abrogate any prior law relating to the same manner, unless the repugnancy between the two is irreconcilable; and hence a repeal by implication is not favored. On the contrary the courts are bound to uphold the prior law, if the two acts may well subsist together." *Landis v. Landis*, 39 N. J. L. 277.

In the act of March 19, 1906, the word "equipped" seems to have occasioned a difference of opinion as to the exact meaning. The word equipped as used in the act means to fit out, to furnish for service, to provide with what is requisite for effective action. There is nothing in the statute to indicate that any other use was made of the word than the definition given by lexicographers. The act provides that it shall be unlawful to haul a car not equipped with couplers, etc. It would therefore seem clear that the intention of the legislature was to compel railroads to equip, fit out, furnish for service cars with couplers of the character designated in the act. But counsel for the state contend that because it uses the language "coupling automatically by impact and can be uncoupled without the necessity of men going between the cars," that it provides for the operation as well as equipping of the cars. Unless a meaning is given to the word equipped other than that above stated, the part of the sentence following that word is descriptive of the character of the couplers and how they shall operate, and it seems to me that in view of the supervision that the state has assumed over the inspection of couplers, that the act of 1906 must relate solely to the equipping of the cars with couplers, and provides a penalty for hauling a car not so equipped.

It is claimed by counsel for the state that the United States

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courts have held that the safety appliance act passed by congress April 1, 1896, 27 U. S. Rev. Stat. 532, covers the subject of couplers and that the construction given to that act should be given to the Ohio law on the same subject. The United States safety appliance act reads as follows:

Sec. 2. "That on and after the first day of January, 1896, it shall be unlawful for any such common carrier to haul, or to permit to be hauled or used on its line, any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

The language of the act of 1906, of the legislature of Ohio, was taken from the act of congress above referred to, and if that were all that the Ohio Statutes contained on the subject of couplers I would unhesitatingly follow the decisions of the United States court on the subject. It has not been pointed out to me, and I have been unable to find any act of congress giving the government the supervision, inspection and control over the couplers on cars used in interstate traffic, as has been assumed by the state of Ohio with reference to state traffic. Therefore the question here is the construction of the two acts of the legislature of Ohio, and by that construction to determine whether the later act repealed the former or rendered it inoperative.

The act giving the state of Ohio supervision over couplers was passed in 1902. The act under which this suit is brought was passed in 1906. Does the act of 1906 repeal or render inoperative the act of 1902?

The general rule is that:

"When some office or function can by fair construction be assigned to both acts, and they confer different powers to be exercised for different purposes, both must stand, though they were designed to operate upon the same general subject. * * * There must be such a manifest and total repugnance that the two enactments can not stand. The earliest statute continues in force, unless the two are clearly inconsistent with and repugnant to each other. * * * Where two acts are seemingly repugnant, they should, if possible, be so construed that the lat-

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ter may not operate as a repeal of the former by implication." 1 Sutherland, Stat. Constr. Sec. 247.

The Supreme Court of North Carolina, in passing on this question says:

"1. The law does not favor the repeal of an older statute by a later one by mere implication.

"2. The implication, in order to be operative, must be necessary, and if it arise out of repugnancy between the two acts, the later abrogates the older only to the extent that it is inconsistent and irreconcilable with it. A later and an older statute will, if possible and reasonable to do so, be always construed together, so as to give effect not only to the distinct parts and provisions of the latter, not inconsistent with the new law, but to give effect to the older law as a whole, subject only to restrictions or modifications of its meaning, where such seems to have been the legislative purpose. A law will not be deemed repealed because some of its provisions are repeated in a subsequent statute, except in so far as the latter plainly appears to have been intended by the legislature as a substitute." *Winslow v. Morton*, 118 N. C. 486, 492 [24 S. E. Rep. 417].

The Supreme Court of Oregon, passing on the same question, uses the following language:

"Is there such repugnancy between the two acts * * * that the two can not stand together? If there is, according to well settled rules of construction, the last act repeals the former by implication. It may be proper to remark in this connection that repeals by implication are not favored. By that I understand it is the duty of the court to so construe said acts, if possible, that they shall both be operative." *State v. Dupuis*, 18 Ore. 372, 375 [23 Pac. Rep. 255].

Counsel for the state cite the case of *United States v. Railway*, 149 Fed. Rep. 486, syllabus 4:

"When an interstate carrier hauls cars considerably damaged by derailment, so that the coupling devices were gone, 379 miles past three or more places where repairing is done, in order to make the repairs at a larger and better equipped shops, it violated the safety appliance law."

Counsel for the state in their brief on page 5 say:

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"Decisions upon this point can be multiplied, but the law is settled and the decision last quoted is so pat as to dispose of the issue."

I am inclined to agree with counsel for the state in the conclusion reached in the sentence just quoted. It should be noted, however, that in the case on which he relies the facts stated were that the cars were so damaged by derailment that the coupling devices were gone. Then the railroad company must have moved the cars in traffic without couplers of the kind designated in the safety appliance act. Applying the law to the facts in that case, I do not see how the court could have come to a conclusion other than it did.

The Ohio law is different in one respect from the safety appliance act passed by congress. The Ohio law divides the subject into two branches, one of equipping its cars, and the other of keeping its couplers in repair.

The pleadings in this case, and it is agreed by counsel that they state the facts, specifically state that just prior to the hauling of the cars complained of by the state, the cars were equipped with the kind of couplers specified in the act of 1906, but they were not coupled by impact, and as I understand it they could not be uncoupled without the necessity of men going between the ends of the cars. If they had such couplers on, then either they were not used or they were out of repair, and if the two sections of the statutes of Ohio are to be given effect, one must relate to the couplers and the other to the use of the couplers when the cars are so equipped.

It seems to follow that the Ohio law with reference to state traffic is different from the act of congress with reference to interstate traffic. To hold that the penalty provided by the act of March 19, 1906, should be collected under the facts stated in the pleadings in the case at bar, would be to hold that the act of April 1, 1902, was repealed by implication or that the passage of the act of March 19, 1906, rendered that statute inoperative.

If I am correct in the conclusion that the law is, that it is the duty of courts in construing statutes to give that construction, if it can reasonably be done, that will make effective both

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statutes, then I must conclude that the act of March, 1906, related exclusively to the equipping of cars with couplers, and that the act of April 1, 1902, provides a method of inspecting the cars, seeing that the couplers are in repair and a penalty for operating a car with a coupler that is out of repair or not used.

A decree will be entered accordingly.

CRIMINAL LAW—INJUNCTIONS.

[Superior Court of Cincinnati, September 3, 1912.]

ADOLPH HIRSCH v. HENRY T. HUNT, MAYOR, ET AL.

Stationing of Police About Suspected Business Place and Surveillance of Patrons not Enjoined.

An injunction against the stationing of police about a place of business in an honest effort to prevent or detect crime, restraining them from intimidating, molesting or interfering with the business thereof and from exercising surveillance over patrons visiting such place, will be refused, if a court may reasonably believe or suspect that things of a forbidden character are carried on in connection with such business, illegal transactions concealed or secret gambling engaged in, especially if plaintiff exhibits a lack of candor, a willingness to suppress the facts and otherwise by his conduct forfeits his claim on a court of equity.

[Syllabus approved by the court.]

INJUNCTION.

J. S. Myers, for plaintiff.

Alfred Bettman and *John Weinig*, for defendants.

HOFFHEIMER, J.

Plaintiff charges in substance, that defendants (mayor, vice-mayor, safety director, chief of police) have conspired to injure him in his business, and that in pursuance thereof they have stationed a uniformed officer in his place of business with instructions to receive all telephone communications, and that they were otherwise interfering with said business, without authority or warrant of law; without invitation of plaintiff, and in violation of his constitutional rights; that defendants

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threaten to and that they will, unless restrained, continue to station a uniformed officer in said place of business; that said defendants have assumed arbitrary and autocratic authority without warrant of law, and will unless restrained injure and destroy his business to his great and irreparable injury, and that he is without remedy at law.

He prays that an order may issue restraining each of the said defendants, their agents or servants, from in any way intimidating, molesting or interfering with plaintiff in his said business; that a temporary restraining order issue against each of said defendants, their agents or servants, from entering his said place of business and from in any manner interfering with said business or in any way interfering with the rights of persons visiting his said place of business or exercising surveillance over persons visiting the plaintiff's place of business, and that upon final hearing said order may be made perpetual, and for all further relief to which in equity he may be entitled.

After hearing the evidence in this case, I find myself beset with doubts concerning the true ownership of the business involved in this controversy, located at 44 East Sixth street, and with reference to which equitable relief is now sought.

And, irrespective of the question of ownership, whether by this plaintiff alone, or in conjunction with Samuel Hirsch, or others, I find I am not free from doubt, as to whether or not this business is not a part of, or not being used directly or indirectly, to further illegal acts, namely, gambling transactions of the kind commonly known as hand books.

These doubts are occasioned not alone by a number of circumstances that are very peculiar, to say the least, but they are intensified as the result of plaintiff's own conduct, while on the stand, by his lack of frankness, and by the suppression on his part of facts, which I can not but conclude was intentional, and this, too, under circumstances which made it imperative for him, seeking the equitable intervention of this court, to make the fullest disclosures and to withhold nothing.

The question as to whether or not these premises, or this cigar business, was being used either directly or indirectly, that is, as a "blind," for that secretive and most objectionable form

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of gambling, known as a hand book, or whether its owners or owner or any one in connection therewith, was engaged in that business, was not in its first instance for this court; nor do I now intend by anything I may say to actually adjudge any one guilty of such offense. That question belongs to, and properly is, for another forum. A court of equity, however, will not issue an injunction at the suit of a person, where it appears that he is conducting an illegal business. See causes collated in 1 Pomeroy, Eq. Jurisp. Sec. 402, n. G. It will not lend its aid to assist a gambling transaction. *Albertson v. Laughlin*, 173 Pa. St. 529 [34 Atl. Rep. 216].

Where the court therefore, has reasonable grounds to believe or reasonably to suspect that business of such a character is being carried on in connection with the business for which relief is sought, or has doubts about it, which would seem to be more or less well grounded, and particularly if such doubts are due to the plaintiff's lack of candor or willful suppression of facts, having a possible bearing thereon, it would be its duty as a chancellor to refuse to hazard its process in such behalf, just as it would be its duty to refuse to appoint a receiver to take charge of a business that did not clearly appear to it to be a perfectly moral and clean business.

These things are true, because equity is distinctly a court of conscience and of morals, and is ever jealous of its power. Knowing this, as I have said, it was particularly incumbent upon this suitor, asking the favor of this court, in view of the nature of the charges brought to the court's attention, to be, above all things, frank with this court, and with these defendants, and to make the fullest disclosures on any and every matter, relevant to this particular litigation, and so as to relieve this court of any doubts.

The foregoing necessarily results from the fundamental maxim in equity, that he who comes into equity must do so with clean hands. Not only this, but he must keep them so. *Bispham*, Equity Sec. 43, n.

There must be no wilful misconduct by him who asks equitable interference, either in respect of the subject-matter

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in litigation (Snell, Equity 25) or with reference to his procedure in that behalf. In *Brown v. Davis*, 23 U. S. App. 579, 596, for example, the court withheld relief where there had been reckless charges of fraud and reckless evidence in support thereof.

The maxim referred to, unlike the maxim, that he who seeks equity must do equity, where the court as a condition or price of conferring the remedy may compel a suitor to provide for a corresponding equity of the defendant, is restrictive in its operation.

It assumes that the suitor, asking the aid of a court of equity, has himself been guilty of conduct in violation of the fundamental conceptions of equity jurisprudence, and therefore, refuses him all recognition and relief, with reference to the subject-matter or transaction in question. It * * * closes the door of the court against such suitor and refuses to acknowledge his right or to award him any remedy. 1 Pomeroy, Eq. Jurisp. Sec. 397.

And it is said, at Sec. 398, while a court of equity endeavors to promote and enforce justice, good faith, uprightness, fairness and conscientiousness on the part of the parties who occupy a defensive position in judicial controversies, it no less stringently demands the same from the litigant parties, who come before it, as plaintiffs, or actors, in such controversies.

And again at Sec. 404, the learned author says:

"It is not alone fraud, or illegality, which will prevent the suitor from entering a court of equity; *any really unconscionable conduct connected with the controversy to which he is a party*, will repel him from the forum whose very foundation is good conscience." [Italics mine.]

I have said that whether this business was directly or indirectly engaged in a hand book was not originally a question for this court, but the stationing of police officers in this place of business, by a department of our municipal government, presumably in an honest effort to detect or prevent crime, and following a "raid" made by it on the office of Samuel Hirsch in the Lyric Theatre Building, where they confiscated papers and telegrams but lately addressed to 44 East Sixth street, because

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of the nature of transactions therein indicated, made the question as to the character of the alleged cigar business at 44 East Sixth street in view of the authorities cited, of importance here.

This plaintiff, Adolph Hirsch, claims that he alone is the owner of the business at 44 East Sixth street. He claims that he is a retail cigar dealer; that his business is legitimate, and in no way used for transactions such as we have been speaking of. He asserts that he bought the cigar business from his brother Samuel some eight years ago.

In view of these claims is it not strange that when, in the latter part of last January or February, the police had been stationed there, evidently as it was then suspected of being a hand book, we find Samuel Hirsch taking it upon himself to see the mayor of our city (a defendant here) requesting him to withdraw the police from his store, and assuring him, that on any further complaint the police might be again reinstated? Surely such action must have been known to this plaintiff. It strikes my mind as being very strange also, if this plaintiff is really the owner of the cigar business at 44 East Sixth street, and has been for the last eight years, as he claims, that we should find in the telephone directory of June, 1912, not the name of this plaintiff but "Samuel Hirsch, Cigars, 44 East Sixth street." It must be borne in mind that it is claimed that Samuel Hirsch did not even have an office at 44 East Sixth street, for contemporaneously or practically so with his avowal to the mayor as already alluded to, he set up an office in the Lyric Theatre Building, where ostensibly he became engaged, not in cigars, but in the "voting booth business." I do not say that any of these matters standing by themselves, prove ownership in said Samuel Hirsch of this cigar business, but I do say, that to the extent this plaintiff knew or suffered these things to be done, as otherwise indicated in evidence, they are circumstances that can not be wholly cast aside, when considering a thing as elusive as a hand book. At or about the time Samuel Hirsch opened his office in the Lyric Theatre building, George Faber and Louis Gatto were taken into the store at 44 East Sixth street, and employed by this plaintiff, so he says, as

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clerks. Chief of police Copelan says these men had theretofore been suspected by the department of hand booking, and that the places of both or of one of them (I am not positive whether it was one or both), were closed by order of the police. Will it be said that the employment of both of these men in the capacity of cigar clerks and at the Hirsch store, and at this time, was but a mere coincidence?

We find further, that months after Samuel Hirsch is supposed to have moved his office to the Lyric Theatre Building, where he is engaged in the voting booth business, telegrams in secret code and otherwise, all confessedly relating to racing matters and to betting, come addressed to him at 44 East Sixth street. Some of these telegrams are signed in initials; others are from another brother, Nathan, who surely must have known if these telegrams had nothing to do with 44 East Sixth street, that since January or February Samuel's office was in the Lyric Theatre Building. Another telegram notably the "My Gal" telegram is to Hirsch's cigar store, 44 East Sixth street, and another to Nathan Hirsch, 44 East Sixth street. None, it may be said are addressed to Adolph Hirsch, *eo nomine*, and notwithstanding he must have known of Samuel's avowal to the mayor, we find him not only allowing these things to be done, but complaisantly opening telegrams, not addressed to him, but to his brother, which, however, we are at once informed was by request only!

The telegram addressed to Hirsch Brothers, 44 East Sixth street, contains simply the words "My Gal." When plaintiff was shown this telegram (and another containing the words "Paris Green") and asked as to the meaning, his manner of answering and the apparent evasiveness of his reply were not calculated to inspire the confidence of the court, or to dispel doubts. He said "he had no idea about it." On being further pressed he admitted he knew said telegrams referred to racing matters; that his brother owned a race horse, etc.

Now, notwithstanding plaintiff admitted he received at his store and himself opened telegrams, he repeatedly protested that he had nothing to do with that business or that they had anything to do with him. But all these matters appearing,

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was it not of extreme importance that he manifest all possible diligence in bringing into court all books, papers and documents that he possessed, and which were asked for, in order that all possible doubts as to these things having some connection with his alleged business, might be set at rest?

Plaintiff was asked for his books. He said he kept none and produced none, save a couple of bank pass books. He claimed that his business was small. He said he did an average daily cash business amounting to \$25 a day, save on Saturdays, when it aggregated \$50. He did no credit business, so he says, and when occasionally credit was extended, it was in some small amount and he asserted no memorandum charge would be made of the transaction whatever!

Current accounts of merchandise purchased are in his name, and some bills exhibited, show this to be true; he pays by check, keeping no stub memorandum; but he did say that he kept canceled checks, and produced a very limited number, which, so far as we can see, purport to be for legitimate transactions.

A very recent lease is made out in his name, and by virtue of it, he pays a rental of \$200 per month. In the absence of any books or memoranda kept in the course of business and taking his mere statement on such matters, it would seem by contrasting the necessary expenses for the upkeep and running of this cigar store, including the purchase of merchandise, rent, living expenses, clerk hire and other necessary expenses, with the cash returns of the cigar business, that it was in reality a rather small business. Yet in August a pass book indicates a single batch of returned checks approximating ten thousand dollar transactions (a rather large amount of dealings for this rather small business) and not satisfactorily explained. He was asked to produce these canceled checks. He had said, as we have heard, that he kept canceled checks. We have already seen that he was able to produce some checks which would seem to indicate legitimate transactions. Plaintiff, however, failed to produce any of this ten thousand dollar lot, although he was given ample opportunity so to do.

Considering now that this is an action against public offi-

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cials, acting in their official capacity, and in an endeavor to suppress crime, and this being an action for injunction, where vigilance and caution are specially enjoined upon the court, *Albery v. Sessions*, 3 Dec. 330 (2 N. P. 237), is this court overly vigilant or unduly cautious, when it asks itself: would these checks or any of them, have thrown any light on the ownership of this store, doing this small cigar business? Would they have shown that this business was being used directly, or indirectly, for hand book purposes? And is there any peculiar significance in the stubborn fact, that this particular batch of checks, for this large sum of money, relates to the precise period of time when telegrams such as those confiscated by the police, were, as we now know, being repeatedly addressed to Samuel Hirsch, Nathan Hirsch, Hirsch's Cigar Store, 44 East Sixth street, and were being opened by Adolph Hirsch by request?

The failure to produce one's books or other memoranda, or even the failure to produce a lot of canceled checks under ordinary circumstances might be reconciled with the best of faith, but when we consider such failure under circumstances such as we have here detailed, and when we consider it in connection with the further remarkable fact, that out of a lot of canceled checks returned to plaintiff from the Columbia Bank, during the noon adjournment hour of the very day of this hearing, there were strangely missing and wholly unaccounted for, checks for \$700 (plaintiff could give no satisfactory explanation), has not this court reasonable grounds for its misgivings—is it not justified in concluding, that the suppression of all these checks was designed and willful?

Such reckless evidence, such manifest lack of good faith is precisely that conduct of which Pomeroy speaks when he says: "It will repel the suitor from a forum whose very foundation is good conscience" (*supra*). It is needless to say more. In my opinion this plaintiff, under all the circumstances, has forfeited his claim upon a court of equity, and, accordingly, his prayer for an injunction will be refused.

Having thus concluded, any opinion I may hold on the question as to the alleged illegal acts of defendants and as set out in the petition, and as to whether such acts are enjoicable

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in equity, as for continuous trespass if there is irreparable injury or multiplicity of suits to be avoided—a question of prime importance to the citizen and one upon which I entertain definite notions—becomes wholly immaterial.

It suffices to say that plaintiff, no matter what his rights may have been, for the reasons given and in accordance with fundamental principles of equity, is remitted to whatever remedy he may have at law.

Petition dismissed.

EVIDENCE—NEW TRIAL—STREET RAILWAYS.

[Franklin Common Pleas, September 16, 1912.]

JAMES C. NICHOLSON v. SCIOTO VALLEY TRAC. CO.

1. Operation of Scintilla Rule Distinguished in Its Application to Motion to Direct Verdict and Motion for New Trial.

While the scintilla rule may require a trial judge, notwithstanding the undoubted adverse weight of evidence, to submit a case to the jury upon motion to direct verdict, yet on motion for new trial, attacking the verdict upon the weight of evidence, the verdict may be set aside for insufficiency of evidence to sustain it. The rule of *Ellis v. Insurance Co.* 4 Ohio St. 628, 645, is still the law of this state.

2. Insufficient Evidence of Negligent Speed of Street Car.

Evidence of casual witnesses that a street car "was going pretty fast," "awfully fast," "going a pretty good rate," "about thirty miles an hour," the last being based on a comparative estimate of the speed of the principal car and one operated at that speed as a test for witness, is too uncertain and unreliable for judicial action; hence, a verdict based upon such evidence, with no reasonable inference to be drawn favorable to plaintiff from the time within which the car was stopped, opposed to which was evidence of street car men of other companies that the car was running not to exceed "eight or ten miles" rate, "twelve miles," etc., is not sustained by sufficient evidence.

C. D. Saviers and *J. C. Nicholson*, for plaintiff.

J. E. Todd, for defendant.

KINKEAD, J.

Plaintiff's intestate, and his child of the age of six years, were killed by a car of defendant company. The child, with

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her father and mother, was walking south on Fourth street between Woler street and Innis avenue. The petition alleges that the child was some distance ahead of her parents; that at or near the intersection of Welch avenue the child started across Fourth street. It is alleged that the father, while his child was crossing the street and tracks, saw defendant's car coming at a high and dangerous rate of speed, and saw that his child was in imminent danger; that he ran forward onto the track to save its life, and while in the act of saving the child, and before he could get off the track, and without any fault on his part, he was killed.

The neglect charged against the company is that the motorman saw the deceased and the perilous position in which he and his child were in, in ample time to have stopped the car and have avoided the injury, had the car been running at a safe and lawful rate of speed, but that the motorman did not stop the car, but ran the car at an unlawful and high and dangerous rate of speed, at about twenty-five miles an hour, and sounded no warning until within a few feet of plaintiff's intestate.

The answer sets forth some of the circumstances, the passing of a city car, claiming that the child ran across the east track onto the west track and immediately in front of defendant's car while the father was concealed from the view of defendant's motorman; that the father ran after the child and collided with her, while upon the track, with such force as to knock her down upon the track immediately in front of defendant's car; and that while plaintiff's intestate was trying to rescue the child from its perilous position he was struck by the car.

The claim of defendant is that the death of plaintiff's intestate was caused solely by his own negligence in going upon the track immediately in front of the car.

It is apparent that the sole ground of negligence charged against defendant is running at an unlawful rate of speed. And contributory negligence is charged against the deceased. The verdict of the jury was for \$3500. Several grounds of error are alleged in the motion for a new trial. As the court

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views the case now the chief question is whether the verdict is sustained by sufficient evidence.

The motion for a new trial was submitted at the close of last term, and because of the importance of the case, it has been held during the adjournment period that more careful consideration could be given it.

The responsibility of the court where such verdict was rendered as is this one, loss of which will be felt so keenly by those in whose favor it is, is to be assumed with due and proper appreciation.

This case has led to a more considerate attention to the relative function of court and jury. The judge and the jury together constitute the court, the one no more than the other, nor the one less than the other. The judge is required to be cautious and circumspect during trial that he will not transcend the province of his duty. And when it comes to a question of affirming or setting aside a verdict, the court is bound not to act beyond its power.

The action of the trial court upon a motion for a new trial is among the most important judicial functions. It involves a review of one's own acts as well as that of the jury. To properly review one's own rulings, the mind must be opened wide to discover mistakes, and must be broad and big enough to readily acknowledge error. It ought to be the first to desire to correct injury done by some mistake. The law is impartial between parties.

When the court ruled on the motion for a nonsuit it was confronted with the scintilla rule. Plaintiff's own evidence refutes the claim that no warning was given by defendant of the approach of its car. But it was thought that there was a scintilla which tended slightly to show that defendant's car might have been running at an unlawful rate of speed. And it was considered that the question whether plaintiff's intestate was guilty of contributory negligence in his attempt to rescue his child was, under the circumstances, one appropriate for the jury to determine.

The scintilla of evidence was made up as follows:

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A passenger on the car said that she did not know how fast the car was running, had not the least idea; did not ride much on the cars, finally saying: "Well it was going pretty fast." "I thought the car was going awfully fast."

William Richardson for plaintiff was first attracted by hearing some one hollow, he was not looking before. but looking after hearing the hollow, he had an opportunity to observe the car from his residence on Welch Ave. for a moment. He said: "I couldn't tell exactly how fast it was going, but it was going at a pretty good rate." "I couldn't make no estimate, because I don't follow the business."

Mrs. Chandler, plaintiff's intestate's widow, stated in answer to a question:

"Are you able to tell how fast that car was going?" said, "About thirty miles an hour."

There was claim in the evidence of excessive speed to be inferred from the distance within which the car was stopped.

J. W. Kraner stated the distance between where the deceased was, and where the car stopped, was about 164 feet. It seems to be the opinion among all witnesses that it stopped down at the next street corner by the grocery store. The witness Zimpfer put the distance within which the car stopped as 90 feet.

There was no evidence offered by plaintiff as to the nature of the car, its brake equipment, nor any opinion evidence as to within what time such a car, under all the circumstances, could be stopped.

No one can reasonably claim otherwise than that there was no more than a mere scintilla of proof. "About thirty miles an hour" was about all there was. And this estimate was based upon a test made by some one else which Mrs. Chandler witnessed when a car was running as fast as she thought the one was running which killed her husband.

W. M. Downey, plaintiff's witness, said he was first attracted by hearing the car whistle.

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DEFENDANT'S EVIDENCE.

For defendant, J. W. Brown, motorman on the city car passing the interurban car going north, stated definitely where the cars passed "pretty near Markeson," that he stopped his car because he heard the whistle on the Scioto car. That the latter "was going he supposed ten miles an hour—something like that, eight or ten."

Burnhart, conductor on the city car, said the interurban car was "running about the ordinary speed as they generally do"; that they were running a little faster south than the city car was running north; the city car, he said, was running five or six miles an hour.

J. M. Butler, a passenger on the interurban, said the car was "not running more than eight or ten miles an hour; the car was traveling slowly,—that it was not going rapidly."

Thos. Hampson, also a passenger on the traction car, a farmer, with experience as a motorman on city cars, said: "Well, I could not say exactly, but I think about twelve miles an hour; something like that."

J. E. Newlove, motorman on the interurban car, said the speed of the car "was twelve miles an hour," at the moment car was drifting, I was not at the time using the current—shut off two squares north of Markeson. Had the car at the required speed."

Such are the various statements of opinion as to speed. The rules required that the controller must not be moved beyond the fifth notch—which it is figured will carry the car between fifteen and twenty miles an hour. The required speed of twelve miles is regulated then by getting the momentum, and then let the car drift. Calvin Skinner, the Superintendent, p. 140—gave his opinion as to the distance within which the car might be stopped according to the rate of speed. At eight miles an hour, within 85 feet; about 9 miles per hour, about 105 feet; ten miles per hour, about 120 feet; eleven miles per hour, 133 or 140 feet; 12 miles per hour, close to 150; 13 miles per hour, about 175; 14 miles per hour, pretty close to 190 to 200; hour, about 235 to 240 feet; and so on.

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In giving this opinion, he assumes that everything is in good working order and the rail was as adhesive as it could be; if the rails were covered or partially so with foreign matter the wheels would skid. Sometimes conditions make it almost impossible to tell where you will stop; the various speeds to which the car may stop will be increased by the descending grade of the track. The evidence on both sides indisputably shows that the track in question was down grade. There is no evidence on either side as to the condition of the track.

The testimony of Mr. Wolf, draughtsman, stated the total distance between Markeson street and Welch avenue is 220 feet, and the descending grade is 59 per cent.

The evidence shows that the motorman started his endeavors to stop the car just after passing Markeson street and the car stopped alongside of the grocery store on Welch avenue. Taking off some feet at Markeson street and some for the space covered by the grocery store at Welch avenue, we will be justified in deducting 30 to 40 feet from the 220 feet distance between the two streets, which might make the car stopping at 175, or 180 to 190 feet, which is not out of tune much if any with Mr. Skinner's estimate, which in the absence of testimony as to conditions leaves not much to rest on.

The point which the jury no doubt relied upon mainly in concluding that the car was running at an excessive rate of speed is found in the statements made by motorman Newlove on cross-examination. He states that there were seven regular stops at street crossings between the union station and Parsons avenue; the car left the station at 10:00 A. M. and the accident between Markeson street, and Welch avenue, took place at 10:12.

The plat introduced only covers the territory surrounding the place of accident; there is no evidence as to what the distance was from the station to the place of the accident; nor that from the latter place to Parsons avenue. The condition of the record as to the matter of speed we think has been fully stated. The evidence shows that the deceased, his wife, and children were walking out in the street, instead of on the sidewalk.

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CONDUCT OF DECEASED.

What occurred is best stated from the testimony of Mrs. Chandler, and the motorman and conductor on the city car. Mrs. Chandler states:

"Well, about in front of Kennedy's. The city car was going north, and after the city car had passed, my husband said to the little girl, 'Let's cross the street.' She started to run, and he started to run after her; and I looked up and saw the big car coming, and I stood still." The big car, she said, was about a block north. The next she saw was Mr. Chandler and Thelma rolling along under the car. (Rec. pp. 73, 74.)

J. W. Brown, motorman on the city car, stated as he saw Chandler, wife and children, that he stopped his car and looked back because he heard the interurban whistle; he saw the little girl running down the track; saw them next when the Scioto car blowed whistle, when they (Scioto car) got pretty near even with the front end of his car and he turned around and saw the little girl on the track (Rec. 96). When he commenced blowing whistle looked back and the little girl had run over on the track and the man started after the girl. Little girl not far in advance of father. When motorman blew whistle I saw him slapping his air on—noticed this just as he was passing me; saw the girl running probably fifteen or twenty feet in front of the car. (Rec. p. 106.)

C. H. Burnhart, conductor on the city car, was on running board of this car. "His attention was drawn to the matter by seeing these people walking on the street; that's what drew his attention and he looked to the little girl ran behind their car to cross the street and saw the girl on the track and just then the man ran over to grab the little girl, and when he grabbed the little girl, he turned to come back, and the car hit him and knocked them both down." (Rec. p. 113.)

The traction car, he said, when the girl ran behind their car was about by the Southwood School.

The evidence is undisputed that the gong was sounded, and the whistle blown; also that the motorman applied the

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emergency brakes. He also states that the little girl saw the car when he blew the whistle and started to run back across.

At the close of all the testimony upon renewal of the motion to direct a verdict, the court was confronted with a question of a scintilla of evidence, answered by what seemed an undoubted weight of evidence, and undisputed evidence which showed contributory negligence of the deceased in being the cause of the child's being placed in danger. The evidence seemed not to be merely evenly balanced.

Growing out of the question of the weight of evidence and the relative functions of court and jury is the scintilla doctrine of long service as a rule of practice in Ohio.

"If the evidence tends to prove all the facts upon which it is incumbent on the plaintiff to establish in order to maintain his action, he has the right to have the weight and sufficiency of the evidence passed upon by the jury and it is error for the court to grant the motion (for verdict) and render judgment against him." *Stockstill v. Railway*, 24 Ohio St. 83; *Cincinnati St. Ry. v. Murray*, 53 Ohio St. 570 [42 N. E. Rep. 596; 30 L. R. A. 508]. As stated in some decisions, if the evidence produced by plaintiff presents a *prima facie* case, it is for the jury. Such a rule will work well perhaps, excepting in cases where the evidence offered by defendant is of apparent greater probity and weight. In that kind of a case if the verdict be returned for plaintiff the court will be compelled to give its view on the sufficiency and weight.

Upon a motion to direct a verdict at the close of all the evidence, in such case, the court is confronted with the question whether it shall set the verdict aside, if found in favor of plaintiff.

Some decisions maintain the rule of practice that if in the opinion of the court there is not evidence to sustain the verdict, should one be found, and upon motion for new trial the court would have to set it aside, such action will then be taken on motion to direct a verdict and nonsuit will be entered. *Baulien v. Portland*, 48 Me. 291; *Greenleaf v. Railway*, 29 Iowa 22; *Cagger v. Lansing*, 64 N. Y. 417.

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In a number of jurisdictions the rule of practice is followed of granting a nonsuit in cases where it appears from the whole evidence a verdict, if found, would have to be set aside. *Vanderford v. Foster*, 65 Cal. 49 [2 Pac. Rep. 736]; *Livesay v. Bank*, 36 Colo. 526 [86 Pac. Rep. 102; 6 L. R. A. (N. S.) 598; 118 Am. St. Rep. 120]; *Illinois Cent. Ry. v. Bailey*, 222 Ill. 480 [78 N. E. Rep. 833]; *Morton v. Frankfort*, 55 Me. 46; *Connor v. Giles*, 76 Me. 132; *Creamer v. McIlwain*, 89 Md. 343 [43 Atl. Rep. 935; 45 L. R. A. 531; 73 Am. St. Rep. 186]; *Wright v. Railway*, 86 Mass. (4 Allen) 283; *Steves v. Railway*, 18 N. Y. 422; *Benoit v. Railway*, 154 N. Y. 223 [48 N. E. Rep. 524]; *Harrah v. Bank*, 26 Okl. 620 [110 Pac. Rep. 725]; *State v. Couper*, 32 Ore. 212 [49 Pac. Rep. 959]; *Michael v. Machine Works Co.* 90 Va. 492 [19 S. E. Rep. 261; 44 Am. St. Rep. 927]; *Kuykendall v. Fisher*, 61 W. Va. 87 [56 S. E. Rep. 48; 8 L. R. A. (N. S.) 94; 11 Ann. Cas. 700]; *Griggs v. Houston*, 104 U. S. 553 [26 L. Ed. 840].

The prevailing principle among the decisions which repudiate the scintilla rule is, not whether there is some evidence which tends to prove, but whether there is evidence upon which the "jury may reasonably and properly conclude" upon the question at issue in plaintiff's favor. The repudiation of the rule is also based upon the theory that there is in every case a preliminary question which is one of law, whether there is any evidence on which the jury may properly find the question for the party on whom the burden of proof lies. If not, the question should be decided by the court and a verdict directed. It is not a question "whether there is literally no evidence but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established." The question is "not whether there is literally no evidence, but whether there is any which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. Where the testimony "is so light and inconclusive, that no rational, well-constructed mind can infer from it the fact which it is offered to establish," there is nothing for the jury. 2 Thompson, Trials Secs. 2247, 2248; *Toomey v. Railway*,

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3 C. B. (N. S.) 150; *Ryder v. Wombuell*, L. R. 4 Exch. 32; *Marion Co. (Comrs.) v. Clark*, 94 U. S. 278 [24 L. Ed. 59]; *Belt v. Marriott*, 9 Gill (Md.) 331.

"There is no practical difference," it is said, between no evidence and evidence without legal weight. The better and improved rule is, not to see whether there is any evidence, a scintilla, or crumb, dust of the scales, but whether there is any upon which a jury can in any justifiable view find for the party producing it, upon whom the burden of proof is imposed." *Connor v. Giles, supra*.

For a long time there has been much criticism of the scintilla rule, many claiming that the courts ought to repudiate it. We venture the opinion that courts cannot change the rule because it became a part of our fundamental law when our government was formed. It had its origin in the common law, *Gibson v. Hunter*, 2 H. Black, 187, 205, containing a lucid discussion of it. Although the rule was long ago abolished in England, and in many American states, it is fastened into the procedural jurisprudence in others by constitutional interpretation, placing it beyond the reach of courts. This is true of Ohio, the rule being clearly stated by Ranney, J., in *Ellis v. Insurance Co.* 4 Ohio St. 628, 645. Those who claim the scintilla rule to be obsolescent will do well to advert this decision, and they will conclude that as long as there is some evidence tending to prove the issue, the court is without power to direct a nonsuit, although it may be of the opinion that the verdict must be set aside as against the weight of the evidence.

That was precisely the attitude of the court in this case.

In logic and on principle, however, it is not easy to distinguish the function of court and jury. When the court is asked to direct a verdict in truth it is asked to pass "upon the merits of the action" as the record then stands, and to render judgment that defendant go hence without day.

It seems reasonable to overrule a motion for nonsuit at the close of evidence of plaintiff where it actually tends to prove the issues. Upon renewal of the motion at the close of all the evidence the question is whether plaintiff finally is left

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with "sufficient evidence" to sustain a verdict found in his favor.

If sufficient evidence as the term is used in the statute as to new trial means what the law requires to support a verdict, viz., a preponderance, there is danger that our logic may lead to a conclusion that it is idle to submit a cause to a jury at all in many cases. But that is where the law places us if a court may only submit a case to the jury when it is of the opinion that there is left a preponderance on the side of the party sustaining the burden the court would then in fact decide all cases.

A preponderance is the test and measure of the weight of the evidence. If it does not preponderate in plaintiff's favor the weight is not with him. If it is evenly balanced the weight is not with plaintiff.

When the court approaches the duty of deciding a question of nonsuit at the close of all the evidence, its point of view is unlike a consideration of a demurrer to plaintiff's evidence.

On demurrer to all the evidence when there is even slight conflict the court faces questions of credibility and of weight, the determination of both of which is within the exclusive province of the jury.

Strictly considered, at that point of the trial, so long as there is some conflict the court cannot grant a nonsuit, as to do so would be to transcend its power, and invade the province of the jury, which is as much a part of the court as is the judge.

This reasoning demonstrates, in a measure, the wisdom of the rule that a court should not set aside a verdict on account of mere difference of opinion between court and jury. It may be also said to disclose the difficulty of applying the rule followed by many decisions that the court should direct a verdict when it is of the opinion that a verdict, if found, would have to be set aside.

The conclusion is plain under present statutory and constitutional provisions, that the functions and duty of court in passing upon a motion for nonsuit is wholly unlike that in passing on a motion for a new trial. The function of the

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court upon a motion for a verdict is strictly analagous to a consideration of a demurrer to a petition.

The rules of our own practice as herein suggested, however, upon broad and liberal grounds, are not at variance with expressions of opinions by courts departing from the scintilla rule.

It may not be difficult to determine, even when bound by the scintilla rule, whether there is any evidence upon which a jury can, in any justifiable view, find for plaintiff. If there be found in the evidence facts and circumstances free from dispute which indisputably defeat a right of recovery, the plaintiff should be nonsuited.

It has been well settled by one of the brethren of the trial bench that where the only evidence of negligence is an inference drawn from circumstances, and other circumstances are proven from which the inferences of the absence of negligence is a more natural and stronger inference, and the verdict is for the plaintiff upon whom the burden rested, it is the duty of the court to see that the party on whom the burden is cast, sustains that burden, and set aside a verdict, which is in effect based upon the conjecture of the jury that the defendant was negligent. *Hamilton v. Railway*, 16 Dec. 617 (4 N. S. 249).

We now consider the evidence in this case in the light of the reason and logic stated. The chief point of contention is whether defendant was running its car at an excessive and unlawful rate of speed. The evidence on this point has been stated. On the side of plaintiff it is to the effect that the car was "going pretty fast," it was "going awfully fast"; "about thirty miles an hour."

It is a rule that "any man of average intelligence who sees a moving car * * * is competent in law to form or express an opinion as to its speed." *Metropolitan Ry. v. Blick*, 22 App. D. C. 194.

Indeed "in estimating time, distance, and rapid motion the mass of men are inexpert." *Huntress v. Railway*, 66 N. H. 185 [34 Atl. Rep. 154; 49 Am. St. Rep. 600]. See *Baltimore & O. Ry. v. Stoltz*, 9 Circ. Dec. 638 (18 R. 93); *Detroit & M.*

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Ry. v. Steinburg, 17 Mich. 104; *Hunter v. Railway*, 112 N. Y. 371 [19 N. E. Rep. 820; 2 L. R. A. 832; 8 Am. St. Rep. 752].

While the probative value of such testimony is for the jury, its unsatisfactory character in many cases impose a duty on the court at some stage of the trial.

"The estimate of a witness, especially of a nonexpert, of the rate of speed of a moving railway train, is very unsatisfactory proof, and should be received with great caution. If the *res gestae* renders it impossible, or even highly improbable, that the estimate can be or is correct, it should be rejected." *Hoppe v. Railway*, 61 Wis. 357 [21 N. W. Rep. 227]. The estimate of speed by the ordinary person is universally regarded as inexact and so inconclusive that their testimony is not deemed to be contradicted, nor their credibility affected by the testimony of others whose opinions are different." Moore, Facts Sec. 120; *Central of Ga. Ry. v. Waxelbaum*, 111 Ga. 812 [35 S. E. Rep. 645]. Such opinions or statements have been held to be mere guess or conjecture, and insufficient to establish the fact. Moore, Facts Sec. 120; *Smith v. Railway*, 187 Pa. St. 451 [41 Atl. Rep. 479].

"The judgment of witnesses in such matters, formed long after the event, and not based upon anything which specially attracted attention at the time, is rarely to be depended upon. It is always safer to look at the facts as they are known to have occurred and judge from them." Moore, Facts Sec. 423; *Gladwish Case*, 17 Blatch, 77.

It is judicially considered quite impossible for one approaching an electric car to accurately judge the rate of speed at which a car is going, and that an ordinary person will fail to detect the fact that an approaching car is running at the rate of twenty-five or thirty miles an hour. Moore, Facts Sec. 425; *Ashley v. Traction Co.* 60 W. Va. 306 [55 S. W. Rep. 1016].

As such opinions depend upon the capacity of the witness, his experience and his opportunity for observation, whether he was specially attentive or indifferently attentive, or excited,

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should all be taken into consideration. Moore, Facts Secs. 433, 434, 436, 438.

It is considered that description of speed simply as "fast," "pretty fast," "swift," "high" is to be deemed a fatal vice in the testimony of an interested party. "When a witness says, therefore, in a given case, that the car ran swiftly, or with speed, he says nothing to the purpose when the inquiry is as to the negligence in the rate of travel. Such testimony is altogether too uncertain for judicial action." Moore, Facts Sec. 466; *Yingst v. Railway*, 167 Pa. St. 438 [31 Atl. Rep. 687]; *Flanagan v. Railway*, 163 Pa. St. 102 [29 Atl. Rep. 743].

So when persons are much excited upon witnessing an accident, and describe the speed "as fast as it could be," "it was pretty fast," "very quick," "ran fast," in the face of the operatives of the car that the speed was moderate, has been held inconclusive and unreliable conclusions and opinions formed during moments of excitement. *Beisiegel v. Railway*, 40 N. Y. 9.

These references to judicial expression are thus given to show the light in which expressions such as appear in the evidence on the side of plaintiff are considered by courts.

Indeed, but one opinion as to speed is given, that by Mrs. Chandler, that the car was going about thirty miles an hour. According to her own testimony her attention was directed to the approaching car coming towards her, just a moment, when the next thing she saw was the terrible scene which shocked her. The test afterwards made by another which she witnessed, made by comparison with a car which she imagined was going as fast as the one which struck her husband, is entirely too unreliable for judicial action.

"One who gets but a glance at a car or train approaching him nearly head on "is not at all well situated to observe accurately the speed." Moore, Facts Sec. 434; *Hanlon v. Railway*, 118 Wis. 210 [95 N. W. Rep. 100].

"A mere guess or conjecture respecting the rate of speed was not sufficient to establish it, and this was all his testimony in regard to it amounted to," *Smith v. Railway*, *supra*.

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There is another rule to be applied. It is that an opinion expressed by an actor, or active participant in an accident resulting in injury who is in charge of the agency causing the same and charged with some duty concerning its manipulations, is entitled to different legal consideration than that of another which is the product of mere recollection.

"Probability of a higher degree of attention and interest gives rise to a presumption of considerable force that a person's recollection of his own act and that of the attendant circumstances is more definite and trustworthy than another's recollection of it; especially if it was an act done in the performance of duty, or the other person's testimony is little more than an expression of opinion or judgment." Moore, Facts Sec. 783; *Bugbee v. Howard*, 32 Ala. 713, 718; *Sanford v. Railway*, 136 Pa. St. 84 [20 Atl. Rep. 799].

Of course it is recognized "on the other hand, the actor is often a witness who is attempting by his own testimony to exonerate himself from a charge of negligence, and this makes him a biased witness, whose memory may not be entirely trustworthy, although such bias would not alone justify a finding that he has corruptly testified to a falsehood." Moore, Facts Sec. 705.

But aside from Mrs. Chandler's opinion, which is considered to have little, if any, weight, and that of the motorman are the disinterested witnesses, the motorman and conductor on the city cars whose testimony corroborate and substantiate that of the motorman. There is no reasonable inference to be drawn from that time within which the car was stopped. There is no evidence on this point further than the bare fact as to where it stopped, and the cross-examination of the superintendent.

Men who are experienced in handling electric cars, such as motormen and conductors, may testify as experts to such matter. *Traver v. Railway*, 25 Wash. 225 [65 Pac. Rep. 284]. And some authority is to the effect that only such persons may be qualified to give opinion as to such a matter, as it depends upon knowledge of the special type of car, the condition in which it was in, and the condition of the track. *Kotila v. Rail-*

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way, 134 Mich. 314 [96 N. W. Rep. 437]; *Schroeder v. Transit Co.* 111 Me. App. 52 [85 S. W. Rep. 968]; *Philadelphia Trac. Co. v. Bernheimer*, 125 Pa. St. 615 [17 Atl. Rep. 477].

However this may be, it is sufficient to say that there is no testimony on this point further than that mentioned. The jury could not have rendered the verdict on the testimony offered. They could only have speculated on the distance from the station to Parsons avenue, and on the testimony of the motorman that the accident occurred between Markeson and Welch avenues at 10:12. The record does not inform the court what that distance was, nor does it disclose the distance from the above streets to Parsons avenue. The record does not even give the number of city blocks to the place of the injury, nor from there to Parsons avenue.

The court might well have concluded for the reasons stated, and upon the authorities, that plaintiff did not present evidence upon which the jury could, in any justifiable view, find for the plaintiff. Be that as it may, it not being the province of this court to modify the scintilla rule, the finding and judgment is that the verdict is not supported by sufficient evidence and the same is set aside.

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BILLS AND NOTES—PRINCIPAL AND SURETY.

[Hamilton Common Pleas, October Term, 1912.]

FIRST NATIONAL BANK v. J. M. WILSON, ET AL.

1. Liability of Accommodation Surety and Subsequent Accommodation Indorsers Inter Esse Determined by Form of Note, Making Former Primarily Liable and Latter Secondarily Liable as in Contribution.

One signing a promissory note under the name of the maker as surety or as accommodation surety cannot enforce contribution from accommodation indorsers signing as such, after the note was so executed, at the request of the maker and with full knowledge of the surety's status of liability, there being no arrangement between the surety and indorsers of mutual liability thereon; hence, in an action under Gen. Code 11713 to determine the primary and secondary liability of surety and indorsers, the form of the note as executed, in the absence of rebutting evidence, raises the presumption that the indorsers are not cosureties or primarily liable with the surety but rather for the surety.

2. Form of Negotiable Note Controls Liability of Sureties and Indorsers Inter Esse.

The form or relative positions of sureties and indorsers or accommodation parties to a negotiable instrument, in the absence of arrangements fixing status of liability different from that prescribed by Gen. Code 8165, 8168, 8169, 8296, fixes the liability of persons inter esse signing as sureties as primary and that of indorsers as secondary.

3. Equitable Doctrine of Contribution Applies to Legal Right of Parties to Note, Notwithstanding Negotiable Instruments Act may not Embrace Equitable Doctrine.

The negotiable instruments act, Gen. Code 8296, defining primary liability and Gen. Code 8165, 8168, 8169, fixing liabilities of makers, indorsers and accommodation parties, determines the legal and relative rights of parties to negotiable paper and, notwithstanding the act may not embrace the right of contribution, the equitable right applies to such legal right or relation.

[Syllabus approved by the court.]

D. C. Kellar, for H. E. Langdon.

Charles Broadwell, for Ellis Smith & Phillip Whitacre.

C. B. Dechant, for Emma Debold, Admrx.

HUNT, J.

In this action a judgment has been rendered in favor of the plaintiff against the makers and indorsers upon the following note:

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"Morrow, Ohio, July 2nd. 1911, No. _____

"Due _____

"Ninety days after date. we, or either of us, promise to pay to the order of the First National Bank, of Morrow, Ohio, \$2000.00 Two Thousand _____ Dollars Value received. Payable at the above named bank. with six per cent interest from date.

"(Signed) J. M. Wilson.

"H. E. Langdon.

"Indorsed by,

"Ellis Smith, George Debold, Phillip Whitacre."

George Debold died and his administratrix was party defendant.

The case now comes on an application for a finding as to who is primarily liable and who secondarily liable under Gen. Code 11713.

There is some question as to whether this court in this proceeding can give the relief which is really desired by the parties. Langdon claims that he signed as accommodation maker and is entitled to all the rights as surety with the indorsers, who were but accommodation indorsers, but the court will pass the technical question and consider the case as if Langdon was asking for contribution from the indorsers as cosurety with them for Wilson.

From the evidence it appears that Wilson was promoting an interurban road through Morrow in Warren county. Other persons were interested with Wilson, but who they were does not appear. Wilson had an office in Cincinnati with Langdon. Langdon expected to derive some benefit from the promotion of the road, but just what or how does not appear. The indorsers are residents of Warren county, and expected to be benefited by the road when completed. Debold and Whitacre were officers of the plaintiff bank. Money was needed by Wilson to pay some of the preliminary expenses of the survey, for which subscriptions had been made by residents along the line of the proposed road. He and Langdon executed the note and Wilson presented it to the bank for discount. The bank refused to take

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it unless it was signed or indorsed by residents of Warren county. Thereupon, at Wilson's request, Smith, Debold and Whitacre indorsed the note, which the bank discounted and the money was placed to the credit of Wilson. Although the evidence is not altogether satisfactory, for the purposes of the case it will be assumed that Langdon signed the note entirely for the accommodation of Wilson and that the indorsers, when they placed their names upon the note, knew such to be the fact. The evidence certainly does not establish that Langdon signed the note for Wilson with any understanding between himself and the indorsers that he was not to be primarily liable upon such note. It will therefore be assumed that as to the bank, Langdon and the indorsers were all either guarantors or sureties for Wilson. Counsel for Langdon rely upon this fact as giving him the right of contribution from such indorsers, and rely on the rule adopted in *Conett v. Squair*, 17 Dec. 65 (3 O. L. R. 558).

The indorsers rely on the form of the note as showing that whether Langdon was surety or not they were not cosureties with Langdon, but sureties or guarantors for him.

That the case of *Conett v. Squair*, *supra*, supports the contention of Langdon may be admitted, but this court was one of counsel in such case and it may be said that the only reason why no proceedings were taken to reverse such decision was because a satisfactory settlement was offered and accepted before such proceedings were begun. The court in *Conett v. Squair*, *supra*, while necessarily admitting that the parties were entitled to the presumption arising from the form of the note and their position thereon, nevertheless because by parol evidence one of the makers of the note was shown to be an accommodation maker although the accommodation indorser was not shown to have any knowledge of that fact, held that such accommodation maker was a cosurety with the accommodation indorser and entitled to contribution as such. The court gave as a reason therefor that, when as between the makers the position of principal and surety was established by parol evidence, although the accommodation indorser did not know of such relation, directly or inferentially, he was charged with

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the duty of ascertaining the true relation between the makers, and liable as if he indorsed with such knowledge. As the leading case supporting such reasoning, *Whitehouse v. Hanson*, 42 N. H. 9, is cited. An examination of such case will show that it is founded upon the premises directly contrary to rules laid down by the Ohio Supreme Court. In *Whitehouse v. Hanson*, *supra*, the court as the premises for its conclusion states, that to make a surety upon a note a principal as to another surety, it must be shown that the latter signed at his request, and that one who signs as surety but without the addition of surety to his name, and leaves it in the hands of his principal, does not make the principal his agent to request the other to sign as surety for him as principal. These premises are directly contrary to the rules laid down in *Oldham v. Broom*, 28 Ohio St. 41, where it is stated in the syllabus that:

"4. Where a joint note is signed by the principal and by one as his surety and is entrusted by the surety to the principal without limit on his authority, such surety thereby impliedly authorizes the principal to obtain such additional sureties or guarantors as may be required to make the paper available for the purposes intended by the original makers, and the sureties or guarantors so obtained may stipulate the terms of their liability, as between themselves and prior parties.

"5. One who thus signs such note, at the request of the principal debtor, to enable him to use it as intended, without the knowledge of the prior surety, and without any agreement or understanding with him to the contrary, may stipulate with the principal debtor and make it a condition of his signing that he signs as surety of the prior parties, and not as cosurety with the prior surety.

"6. Such stipulation need not be in writing, and parol evidence is admissible to show an express contract to that effect, or facts and circumstances that will raise an implied contract."

In the present case the indorsers do not rely upon parol evidence, but upon the form of the note as raising not only an

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implied contract, but a constructive contract that they are sureties for Langdon and not cosureties with him.

Different premises necessarily lead to different conclusions and the premises in *Whitehouse v. Hanson*, *supra*, being contrary to the decisions of the Supreme Court of Ohio, the conclusion therein is therefore not necessarily the law of Ohio. The court in *Conett v. Squair*, *supra*, cites as an instructive case, *Houck v. Graham*, 106 Ind. 195 [6 N. E. Rep. 594; 55 Am. Rep. 757], but that case is similar to the case of *Crouse v. Wagner*, 41 Ohio St. 470, wherein parties already liable on a note, upon the renewal thereof by the form of the renewal attempted to change their positions to the prejudice of a new party signing the renewal as surety. In both cases these circumstances were considered as of great weight in the determination of the equities involved. There were no such circumstances in *Conett v. Squair*, *supra*, nor in the case at bar. The other cases cited by the court in *Conett v. Squair*, are also insufficient to support its reasoning, either because the principles upon which they were decided are contrary to Ohio Supreme Court decisions, or because the form of the note upon which the parties were all sureties, raised no presumption as to any other liability as between themselves than that of cosureties. In the case of *Conett v. Squair*, as well as the case at bar, the indorsers must be presumed to have intentionally selected that form of becoming sureties, and in the absence of parol evidence to the contrary, are entitled to the presumption of liability as between themselves and the makers which the law raises from their relative positions upon the note.

There is no question but that when parties are shown to be sureties the presumption is that they are cosureties, but such presumption in the case at bar is rebutted by the presumption arising from the form in which they have intentionally cast their obligation. There is no question but that in Ohio, unless the Negotiable Instruments act has made a change in the law, that all the parties, makers and indorsers of the note in question, could be sued by the payee as makers, and are primarily liable. *Evans v. Brooks-Waterfield Co.* 55 Ohio St. 596, 606 [45 N. E. Rep. 1094; 35 L. R. A. 786; 60 Am. St. Rep. 719].

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But the question in this case is not with the payee but between the makers and the indorsers. In the absence therefore of evidence rebutting the presumption raised by the position of the parties upon the note, it must be considered that Langdon was not a cosurety with the indorsers, nor entitled to the rights of such.

The case at bar may be considered also in connection with the Negotiable Instruments act.

Gen. Code 8296. "The person 'primarily' liable on an instrument is the person who by its terms is absolutely required to pay it. All other parties are 'secondarily' liable.

Gen. Code 8165. "By making it, the maker of a negotiable instrument engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse."

Gen. Code 8168. "A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity."

Gen. Code 8169. "When a person not otherwise a party to an instrument places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rule:

"1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.

"2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

"3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee."

In the case of *Richards v. Bank*, 81 Ohio St. 348, 359 [90 N. E. Rep. 1000; 26 L. R. A. (N. S.) 99], it was clearly held that the Negotiable Instruments act is not a mere codification or revision of existing law, but was a complete system of law on the subject of negotiable instruments, and intended to take the place of conflicting statutes and judicial decisions, and that

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the rule *expressio unius est exclusio alterius* is therefore particularly applicable to the construction of such act.

Such being the case, when Langdon as maker, and Smith, Debold and Whitacre as indorsers, placed their names upon the note, each assumed certain definite liabilities and acquired certain definite rights. Even if parol evidence is permissible to show that their relations were different, in the absence of competent parol evidence establishing any different relation, the statutory status must be given to them, and no one can be held to a different liability or given a greater right than prescribed by statute by reason of any act of the other, unless he was a party to such act.

It may be true that the Negotiable Instrument act does not embrace the equitable right of contribution but when the statute fixes the legal or relative right of parties the equitable right is applied to such legal right or relation.

It follows, therefore, that the indorsers upon the note in question, not being parties to any arrangement between Wilson and Langdon, by which Langdon was to be a mere surety as to such indorsers, he is as to such indorsers a maker, and therefore not entitled to the rights of a cosurety.

RESTRAINT OF TRADE.

[Montgomery Common Pleas, December 27, 1912.]

JAMES PAPPAS V. CHARLES ZONARS.

Sale to Partner of Interest in City Candy Store and Agreement for Liquidated Damages for Operation Beyond Period Prescribed not Restraint of Trade.

A written agreement between two partners, operating two candy stores on different streets in the same city, by which one agreed to sell to the other one store on condition that if the latter should operate such store after a designated date he should pay the former a stipulated additional monthly compensation for each and every month such candy store was operated, is not in restraint of trade and against public policy, is not oppressive or unreasonable because of the liquidated damages prescribed or without consideration, both having mutual interest in remaining store.

[Syllabus approved by the court.]

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DEMURRER to amended petition.

J. D. Clark, for plaintiff.

R. G. Fitzgerald, for defendant.

BROWN, J.

The plaintiff alleges in substance that prior to March 4, 1908, he owned a candy store at 4 East Third street, Dayton; that upon that date he sold to the defendant his interest therein and that he entered into a written agreement, that one of the considerations of the sale was that he had agreed that if he continued the candy business at said storeroom after November 1, 1908, he would pay the plaintiff \$50 a month, as additional consideration, for each and every month he continued to operate the candy business at that number. He alleges that the defendant did continue said business after said date until January 21, 1910. He alleges the failure to pay the several installments, as due him from the defendant, the sum of \$733.33, with interest on the several installments.

"Exhibit A" sets forth that the parties have agreed to continue their partnership in the candy business at 140 South Main street, Dayton, provided they can obtain a lease on the premises; it recites a sale by Pappas to Zonars of his candy store at 4 East Third street, and the agreement that if Zonars continues in business after November 1, 1908, he shall pay Pappas \$50 a month. Then follows an agreement that in case either party desires to sell the store at 140 South Main street. there shall be an appraisement, and the further clause that, if the business at 4 East Third street is continued after November 1, 1908, either by Zonars or by a sale to his brothers or brother, the same provisions should be in force as to penalty.

The law of Ohio has been very clearly stated in *Lange v. Werk*, 2 Ohio St. 520, followed in *Thomas v. Miles*, 3 Ohio St. 274; *Lufkin Rule Co. v. Fringeli*, 57 Ohio St. 596 [49 N. E. Rep. 1030; 41 L. R. A. 185; 63 Am. St. Rep. 736]; *Grasselli v. Lowden*, 11 Ohio St. 349.

This principle is clearly stated in *Lange v. Werk*, *supra*, in the syllabus, that:

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"All contracts in general restraint of trade are opposed to public policy and void, and those in partial restraint are also illegal except when founded upon a valuable consideration and when good reasons appear for entering into the contract. Before such a contract can be enforced, it must appear from the pleadings and the proofs: 1. That the restraint is partial; 2. Founded upon a valuable consideration; 3. That the contract is reasonable, and not oppressive."

The syllabus in *Lufkin Rule Co. v. Fringeli*, *supra*, states that:

"All agreements in general restraint of trade are against public policy and void; but agreements having such partial effect only, made in connection with the purchase of a business and its good will, shown to be reasonably necessary to the enjoyment of the good will of the business purchased, and not oppressive, may be enforced."

9 Cyc. 523 *et seq.*; 5 Dec. Dig. p. 145; Black's Law Dict. p. 1030, and 2 Bouvier's Law Dict. (Rawle's Rev.) p. 909, show that these principles are followed throughout the United States as well as in England.

By reviewing these authorities I find that the test of Tyndal, Ch. J., in *Horace v. Graves*, 7 Bing. 743, has been universally followed: viz., "We cannot see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public."

The circuit court of this circuit, Judges Stewart, Shauck and Shearer, in *Paragon Oil Co. v. Hall*, 4 Circ. Dec. 576 (7 R. 240), followed this principle in a very able decision.

The liquidated damages in the case at bar are reasonable, and the fact that the only restraint in trade, in case the penalty is not required, is the abandonment of the candy business at 4 East Third street, which is a very trifling restraint in trade and surely is not against public policy, as the public cannot be affected by the abandonment of many candy stores in Dayton,

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especially at this holiday season, of which the court will take judicial cognizance. There is no want of consideration, because the conduct of the candy business on Third street by one of the partners would certainly affect the partnership business on South Main street by the firm, and this of itself will import a consideration for the penalty.

Therefore, in the opinion of the court, the amended petition states a good cause of action in the premises, is not founded upon a contract in the unreasonable restraint of trade, is not oppressive, has a valuable consideration and is not against public policy.

Therefore it becomes the duty of the court to overrule the demurrer to the amended petition.

POWERS—WILLS.

[Hamilton Common Pleas, November 23, 1910.]

ELIZABETH McAVOY v. MARY MCCARTHY ET AL.

1. Testamentary Provision Giving Widow Power to Sell and Consume for Support Gives Power to Sell but not Consume.

A testamentary provision that "whenever it may be necessary for the welfare of my said wife * * * my said executor shall have power and authority to give a good and valid deed or other evidence of title, without the intervention of the probate court or of any court and at a price acceptable to my said wife," does not authorize the widow to consume any part of the principal estate.

2. Power to Consume must be Exercised During Life of Widow.

If authority to consume exist, it is an authority that must be exercised only during the lifetime of the widow; and an action for services made necessary on account of the helpless condition of the widow and for an order making the amount of the claim a lien on the real estate of the husband will not lie where delayed until after the death of the widow.

[Syllabus approved by the court.]

DEMURRER to petition.

McAvoy v. McCarthy.

Heilker & Heilker, for plaintiff.

Chas. F. Williams, for defendants.

SWING, J.

Plaintiff rendered valuable services to Elizabeth Maher, widow of Peter Maher, deceased, in her lifetime, in nursing and caring for her during a long period of illness. Said Elizabeth Maher agreed to pay plaintiff \$5 per week for services, and the claim amounts to \$2,060. Nothing was ever paid for the service rendered. Said Elizabeth Maher died, leaving no estate whatever, unless she could be said to have left some interest in her deceased husband's estate under his will, which could be subjected to the payment of her debts. She left a will in which she recites the said service and indebtedness to plaintiff and her inability to pay it out of her small income from her husband's estate, and says:

"I therefore direct that the property devised to me by my deceased husband be subjected to the payment of this debt incurred because of the helpless physical condition I have endured for many years, and because I deemed such service necessary for my welfare."

Said Peter McCarthy by his will devised all his property, real and personal, to his said wife, Elizabeth, "for the term of her natural life." He devised all his estate, real and personal, at the death of his wife, "absolutely and in fee simple" to his niece, Mary McCarthy. He named as his executor, Charles F. Williams, Esq., and then provided as follows:

"My said executor shall collect the rents and profits issuing out of my said estate, and pay all debts, taxes and repairs and necessary expenses. My executor shall then pay the balance to my said wife. Whenever it may be necessary for the welfare of my said wife and niece, my said executor shall have full power and authority to give a good and valid deed or other evidences of title without the intervention of the probate court or any court, and at a price acceptable to my said wife and niece."

It is claimed that this last item authorized the executor and made it his duty to sell real estate for the necessary support of

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the widow, and it is alleged that the executor knew of her helpless condition and needs, and "was requested to sell said real estate and use the proceeds for the care and support and welfare of said Elizabeth Maher, but that he refused and failed to do so."

It is also alleged that there were other debts, funeral expenses, etc., of Elizabeth Maher unpaid.

Plaintiff prays that "she may recover the sum alleged, and that it be adjudged a lien on the real estate of Peter Maher, deceased, and that the executor be required to sell said real estate and pay said claim and other claims against the estate of Elizabeth Maher," and for other relief.

The will does not in terms provide that in the event of a sale the widow may consume any part of the principal of the estate, and I hardly think it will bear such construction by implication. It does not in terms provide for anything more than a change of the form of the estate by a sale of the real estate; and that when "necessary for the welfare of the wife and niece." But if it be granted that the executor was empowered to sell and use the proceeds or any part of them, for the support of the widow, I think that was a power that must be exercised in the lifetime of the widow. If she herself had been expressly authorized to sell the real estate and use a part of the proceeds for her support, she must have exercised the power in her lifetime.

In 2 Underhill, Law Wills Sec. 686, it is said:

"If land be devised to a person expressly for life only, in certain and definite language, with a power of use or disposal, an estate for life only passes and if the devisee dies without exercising the power, it will go to the devisee of the testator as a contingent remainder * * * if he has devised it over; * * * no estate in the land will pass under the power until it has been executed. Hence, therefore, in the case of real property, if the life tenant who has a power of disposal has not disposed of the same during his life in accordance with the power conferred upon him by the testator, the fee simple * * * will go to the persons appointed," etc.

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Also Sec. 687 to the same effect:

"For, if the power of the life tenant to dispose of the fee of the land for the purpose which is pointed out by the testator has to be executed during his lifetime, and he fails or refuses to execute it for that purpose, the power is extinguished by his death and the fee passes under the will to the remaindermen."

See also notes to Secs. 686 and 687, and cases cited.

The law as to the life tenant in such case must also be the law as to the executor. The will would seem to show by its terms that the power to sell must be exercised in the lifetime of the widow, for it is said the sale must be at "a price acceptable to my wife and niece."

This is a hard case. I would gladly aid the deserving plaintiff if I could. But I am not able to see my way to do it according to law. The demurrer will therefore be sustained.

MUNICIPAL CORPORATIONS.

[Lorain Common Pleas, ———.]

D. K. SMETZER, ET AL., v. ELYRIA (CITY) ET AL.

Best Interests of Municipality, not Landowners, Controlling Factor in Refusing Detachment of Farm Lands within City Limits.

Detachment of unplatted farm lands, situated within the corporate limits of a rapidly growing city, in close proximity to the business portion thereof, located in the direction of greatest development, and available for building lots, will not be granted upon the ground that such lands are taxed beyond reasonable benefits derivable from present improvements, especially since the interests of the municipality, as distinguished from those of the landowners, will be best served by their retention.

[Syllabus approved by the court.]

F. A. Stetson, for plaintiffs.

G. B. Findley, for defendants.

STROUP, J.

The petitioners in this proceeding are asking to have their lands detached from the municipality of the city of Elyria,

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setting forth in their petition that their lands are unplatted farm lands, that they are now taxed in substantial excess of the benefits conferred, that said lands may be detached without materially affecting the best interests or good government of such municipality.

The statute under which the detachment is sought is Gen. Code 3579, and it provides that under certain conditions an order or decree may be made by the court, in its discretion.

This case has given the court considerable trouble in arriving at a proper and just decision. It will be noticed that the statute says that such detachment may be made where it does not materially affect the best interests of such municipality. In view of the wording of the statute it is plain that then the court should not only look to the interests of the applicants who are seeking detachment, but it should bear in mind that the best interests of the municipality are as well at stake.

As the lands are now used it does appear to the court that they are taxed beyond the benefits which can at present be derived from any improvements which the city has made. The principle of taxation proceeds upon the theory that the property taxed is to be benefited in substantial proportion to the burden imposed, but I may say in this regard that I do not wish this decision to have any effect in proceedings which may be brought or which are now pending involving this question as to these or other lands. The remedy for over-taxation is in another proceeding than this.

It is well known to the court that the city of Elyria is now in the process of a great development, that the lands in question are situated in the direction in which the greatest development and growth is being made. If these lands were to be detached, then other lands bordering upon the north and west of the city could with equal justice be detached. So, then, we can see that a detachment of any of the lands mentioned in this proceeding is of far-reaching importance to the substantial interests of the city of Elyria. It is not beyond a reasonable reach of the imagination to say that if an electric railroad were projected in the eastern part of the city as contemplated these

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lands in question would immediately become available for building purposes, and certainly no owner of land is going to continue to use his land for agricultural purposes when the same would be much more valuable for other purposes.

Lands north of some of the lands in question, located between Broad street and the tracks of the Lake Shore & Michigan Southern Railway, have within just a short time been annexed to the city of Elyria. It seems to me that I have a right to say now that the city should consider annexation of contiguous lands instead of a detachment of lands located within the limits of the city. If the court were to detach these lands the city would have a right, if it deemed it for the best interests of the municipality, to attach the very property which the court had detached. Some of the lands in question have been purchased recently, and probably the owners are now the possessors of the particular lands in question because they are within the limits of the city, or for the reason that they are located in close proximity to the business part of the city, both of which elements enter into their value.

While it is true that the lands owned by the petitioners are used exclusively for agricultural purposes, still it cannot be denied that the real value of such lands is affected materially by the fact that they are situated in their present location. The court should take a broader view in deciding this case than merely looking to the immediate interests of the owners of the land. Above and beyond this should be considered the best interests of the city of which they are now a part. These landowners have a community of interest with the city and a corresponding reciprocity of duty. It is well claimed by the city that the construction of the expensive sewer improvements, especially in this locality, were made with a view to taking care of the sewage from the lands of the plaintiffs, and probably the sole object of instituting these proceedings was to rid the owners of the burden of taxation in reference to this particular improvement.

It becomes necessary for the court in the rendering of the decision in this case to establish a policy in reference to de-

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taching property, especially as it applies to the city of Elyria. It might be well for the city to consider that so long as lands are taxed they should have the benefit of something more than their mere proximity to the business center of the city. However, it is not my purpose to dictate to the city officers, but offer this as a suggestion worthy of their consideration.

I was at first inclined to the view that I should look merely to the interests of the landowners, but upon fully considering the matter and appreciating the far-reaching effect of the decision, as well as the substantial interests of the community, I feel it is my duty to refuse a detachment of the lands described in the petition in this case, and if the parties feel that they are aggrieved by excessive taxation they are at liberty to pursue the remedy provided by law.

A decree may be entered in this case dismissing the petition at the costs of the plaintiff.

COVENANTS—RAILWAYS.

[Hamilton Common Pleas, 1912.]

PETER ZENS v. C. C. & ST. L. RY.

Contract to Build Roadway Over Tracks of Railway Within Year of Completion not Covenant Running With Land Binding on Successor of Railway Company.

An agreement in writing and recorded for the construction, within a year from the completion of a railway on a right of way, of a roadway across its tracks thereon, is not a covenant running with the land, specifically enforceable against the successor of the grantee after the lapse of several years, there being no condition requiring a successor to build or maintain it or any reservation to the grantor thereof of a right of way over such railway.

[Syllabus approved by the court.]

INJUNCTION.

S. B. Hammel and F. M. Coppock, for plaintiff.

Harmon, Colston, Goldsmith & Hoadley, for defendant.

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GORMAN, J.

This is an action for specific performance of a contract or perhaps for a mandatory injunction to require the defendant company to construct a roadway across its railroad's right of way at the south end of the village of Hartwell, so as to furnish access to the plaintiff to his lands lying on the east and the west side of said railroad.

Plaintiff claims that in 1871, his predecessor in title to the land described in the petition, being the Hamilton County House Building Association, entered into a contract with the Cincinnati & Springfield Railroad Company, predecessor in title of the defendant, whereby it was agreed by and between said parties that said Cincinnati & Springfield Railway Company, within one year from the completion of its railway on its said right of way, would build a suitable roadway from the highway known as Wayne avenue on the west side of said right of way to the part of the premises described in the petition lying on the east side of said railroad; that said agreement was duly recorded on May 13, 1887, by the recorder of Hamilton county. Plaintiff further avers that said railroad was completed shortly after the making of said agreement; that no roadway was ever constructed by the defendant or its predecessor in title, and he prays that the defendant be restrained from further failing and refusing to construct said roadway and that upon a final hearing said injunction may be made perpetual, and for such other and further relief to which he may be entitled.

Whatever may be the nature of the relief to which the plaintiff is entitled it appears to the court that plaintiff is praying for a specific performance of this contract. A demurrer has been interposed to the petition on the ground that it does not state facts sufficient to constitute a cause of action. It is contended by the defendant company that this agreement is not a covenant which runs with the land, but merely a personal covenant or contract entered into between the plaintiff's predecessor in title and the defendant's predecessor in title of its railroad.

I am of the opinion that this agreement is not a covenant

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which runs with the land. It does not bind the assignee or successor of the defendant's predecessor in title to build or maintain the roadway; nor is there any reservation to the predecessor in title of the plaintiff of a right of way over the railroad. It is merely a contract between the parties to build a roadway within one year from the completion of the railroad.

Now, it appears to me that the plaintiff's predecessor in title could have sued for breach of contract and the measure of damages would have been the cost of constructing the roadway; or, the defendant's predecessor in title might have been called upon to construct the roadway; but it does not follow that the successor in title of the Cincinnati & Springfield Railway Company took the railroad burdened with this covenant. I think this conclusion is supported by the cases of *Steible v. Railway*, 10 Dec. Re. 47 (18 Bull. 202); and *Austerberry v. Oldham*, 29 L. R. Ch. Div. 750, a decision of the court of appeals of England. The facts in this latter case were very similar to those in the case at bar. In that case a party had granted to certain trustees a piece of land over which it was covenanted that the trustees should construct and maintain a roadway of which the public should have the use, but in which the owner of the property granted should have certain special rights and privileges appertaining to the remainder of the property. The trustees afterwards sold the property covered by the roadway to another party, and the court held that the covenant to construct and maintain the road was not one that ran with the land, and was not binding upon the assignee. It will be observed that in that case the covenant was one not only to build the road but also to maintain it, apparently a much stronger case than the one at bar.

In the case of *Masury v. Southworth*, 9 Ohio St. 341, Judge Gholson in deciding this case uses this language at page 349:

"In determining whether a particular covenant was intended to run with the land, the fact that its particular subject-matter was not in existence at the time the estate was created is undoubtedly very important and material, and in

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many instances might be regarded as a controlling consideration. In such a case, though the subject-matter be connected with the land, as a house or wall to be built upon it at a future day during the term, yet if nothing more appeared to indicate the intent, it might be regarded as a personal covenant, and not running with the land. If, however, an intent be shown that the covenant shall run with the land by binding the 'assigns' in so many words, then the covenant does run with the land and the assignee of the lease is bound. Thus, it was resolved, in the leading case upon this subject: "If the lessee had covenanted for him and his assigns that they would make a new wall upon some part of the thing demised, that forasmuch as it is to be done upon the land demised, that it should bind the assignee; for although the covenant doth extend to a thing to be newly made, yet it is to be made upon the thing demised, and the assignee is to take the benefit of it, and therefore shall bind the assignee by express words." *Spencer's case*, 5 Coke 16 b.

In the case at bar, if the Cincinnati & Springfield Railway Company's assigns or successors had been obligated in the covenant to build the roadway, I have no doubt that the covenant would have been one that would run with the land. Or, if there had been a reservation by the grantor—the Hamilton County House Building Association—of a roadway over the railroad company's right of way, and a covenant to build the roadway on the part of the defendant company's predecessor in title, I am disposed to believe that such a covenant would run with the land. But the covenant in this case appears to be merely one between two companies and does not appear to undertake to bind their successors or assigns.

The case of *Easter v. Railway*, 14 Ohio St. 48, has been cited by counsel for plaintiff, but a perusal of the facts in that case will disclose that the grantor covenanted for himself, his heirs and assigns to erect and maintain a fence on each side of the right of way of the railroad company, and he reserved the right to pass and repass over the railroad in such a way as not to interfere with the running of trains. The court very properly held in that case that this was a covenant which ran with the land.

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The case of *Huston v. Railway*, 21 Ohio St. 235, has also been cited by counsel for plaintiff. The facts in that case disclose that the railroad company agreed to erect and "forever keep up" fences and crossings on the lands of the plaintiff. This was held to be a covenant which ran with the land. There can be no doubt of the correctness of this ruling, in view of the fact that the railroad company was obligated to erect and "forever keep up" fences.

Counsel for plaintiff have cited the case of *Kuebler v. Railway*, 20 Dec. 525 (10 N. S. 385). at page 532 the quotation from Sugden, Vendors (2 ed.) 734, 743.

It appears to me that in order that a covenant should be held to be one that runs with the land, it must be made with reference to something existing on the land or to be put upon it, and that the intention of the parties manifestly appears, either by the instrument or by the surrounding circumstances to have been to bind the assigns, heirs or successors of the party obligating himself under the contract.

In the case at bar, I am unable to see wherein the defendant's predecessor in title undertook to do more than build a roadway. The fact that it owned the railroad over which the roadway was to be built would not make its contract a covenant running with the land, unless there was something in addition to this mere contract which would indicate an intention upon its part to bind its successors and assigns.

It is urged by counsel for plaintiff that both the parties would be benefited by this roadway, and that this should be taken into consideration in determining the character of the covenant. I am unable to see how the railroad company would be benefited by having a roadway cross over its right of way. It would be a benefit to the owner of the land lying on either side of the railroad, but would be an additional burden on the railroad company, both to construct the roadway and to permit it to be maintained and used by the landowners after it was constructed. There was no obligation resting on the railroad company to maintain the roadway after it was once constructed. but it would be manifestly a burden upon the railroad company's

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use of its right of way for the plaintiff and his predecessor in title to have the right to pass over its right of way on this roadway perpetually. It could very readily have been made a part of the consideration for the granting of the right of way to the railroad company when the grant of the right of way was made in 1871, that this roadway should be constructed and maintained, and that the assigns and successors of the railroad company should be obligated to construct and maintain this roadway. This the parties failed to do, and under the authorities as I read them, this is not a real covenant, one which runs with the land.

The demurrer to the petition will therefore have to be sustained.

MUNICIPAL CORPORATIONS—WATERWORKS.

[Summit Common Pleas, September, 1912.]

PATRICK T. McCOURT v. AKRON (CITY) ET AL.

1. Publication of Ordinance Directing Advertisement for Bids and Award of Contract for Waterworks Plant is not Necessary After Vote for Bonds and Determining Ordinance Enacted.

A contract for a municipal improvement, the necessity of issuing bonds to pay which has been declared by resolution of council duly enacted, the issue of which is approved by requisite vote of electors at a legal election, the proceeds of which are placed in the city treasury to the credit of the proper fund and its use limited to the purposes of the particular improvement by determining ordinance duly passed and published, is not invalidated by failure to publish a subsequent ordinance directing the director of public service to advertise for bids and enter into contract with the lowest and best bidder, for the reason that the ordinance previously enacted, appropriating

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the proceeds of the bonds, is the determinative ordinance, and the last ordinance, if necessary in any event, could have no other object than to notify the director to perform duties required of him by statute.

2. Requirement of Statute That \$500 Contracts be Authorized by Ordinance Is for Purposes of Notice to Service Director.

The requirement of Gen. Code 4328 that expenditures exceeding \$500 "first be authorized and directed by ordinance of council" as applied to expenditures previously authorized by resolution of necessity and vote of electors to issue bonds therefor, is limited to purposes of notification to the service director that money is duly appropriated and to proceed according to law.

3. Contract Designating Special Process not Invalidated if Patent Expired.

A contract for a municipal improvement is not invalidated by the fact that the successful bidder was the only one designating material of a particular method of construction if the bid was of the class of material designated in the specifications, and notwithstanding the process accepted was exclusively manufactured and controlled by the bidder thereon, where it appears that any patents on the same had expired at the time of bidding.

4. Best and Lowest Bid, not Necessarily Lowest Mathematically.

A municipal improvement contract, awarded to a bidder experienced in kind of work to be done, whose material is not shown to be inferior to material submitted by unsuccessful bidders will not be set aside because mathematically the bid was not the lowest: courts will not interfere with discretion of officers in whose discretion is lodged the determination of a lowest and best bid.

INJUNCTION.

Sieber & Sieber and Otis, Beery & Otis, for plaintiff.

Jonathan Taylor, city solicitor, Ralph L. Kryder and Scott D. Kenfield, for defendant, City of Akron:

Cited and commented upon by the following authorities: *State v. Roebuck*, 15 Dec. 402 (2 N. S. 688); *Cincinnati v. Bickett*, 26 Ohio St. 49; *Yaryan v. Toledo*, 28 O. C. C. 259 (8 N. S. 1); *State v. Barton*, 27 Neb. 476 [43 N. W. Rep. 249]; *Pope Mfg. Co. v. Granger*, 21 R. I. 298 [43 Atl. Rep. 590]; *Akron v. Dobson*, 81 Ohio St. 66 [90 N. E. Rep. 123]; *Merchants Bank v. Insurance & Tr. Co.* 12 Dec. Re. 740 (1 Dis. 469); *Fairchild v. St. Paul*, 46 Minn. 540 [49 N. W. Rep. 325].

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Rogers, Rowley & Mather, for Carroll-Porter Boiler & Tank Co.

Cited and commented upon by the following authorities: *Fogarty v. Cincinnati*, 17 Dec. 752 (5 O. L. R. 54); *State v. Board of Public Service*, 81 Ohio St. 218 [90 N. E. Rep. 389]; *Yaryan v. Toledo*, 28 O. C. C. 259 (8 N. S. 1); *Holbrook v. Toledo*, 28 O. C. C. 284 (8 N. S. 31); *Scott v. Hamilton*, 29 O. C. C. 652 (7 N. S. 493); *State v. Hermann*, 63 Ohio St. 440 [59 N. E. Rep. 104]; *State v. Shelby Co. (Comrs.)* 36 Ohio St. 327; *State v. Board of Public Affairs*, 2 Circ. Dec. 428 (4 R. 76); *State v. St. Bernard*, 4 Circ. Dec. 224 (10 R. 74); *State v. Columbus (Bd. of Ed.)*, 10 Dec. Re. 314 (20 Bull. 156); *McClain v. McKisson*, 8 Circ. Dec. 357 (15 R. 517); *Hubbard v. Sandusky*, 6 Circ. Dec. 786 (9 R. 638); *Fergus v. Columbus*, 8 Dec. 290 (6 N. P. 82); *Winslow v. Cincinnati*, 9 Dec. 89 (6 N. P. 47).

STROUP, J.

This is an action brought by Patrick T. McCourt, as a taxpayer of the city of Akron, against the city of Akron, Robert M. Pillmore, director of public service, James McCausland, city auditor, and Harley J. Motz, city treasurer, and the plaintiff avers in his petition that a certain ordinance No. 3242, passed by the city council of Akron on May 27, 1912, was not published in accordance with the statute, and that for that reason the subsequent action of the director of public service in reference to the letting of a contract for the construction of certain parts of the municipal waterworks plant was illegal and in violation of law, and secondly, the plaintiff contends that the officers of the city in letting the contract mentioned, illegally conducted themselves in such a manner that competition among the bidders was prevented and stifled and that the lowest and best bid was not accepted, and that there was an abuse of discretion on the part of the executive officers of the city resulting in a fraud upon the city and the taxpayers thereof. Plaintiff prays in his petition that an injunction be granted restraining the executive officers of the city of Akron from going forward

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with the execution and performance of the said contract, and also restraining the payment of money on said contract.

The successful bidder to whom the contract was let, namely, the Carroll-Porter Boiler and Tank Company, was made a party defendant and the answer of this defendant and the answer of the other defendants herein take issue with the plaintiff and aver that the proceedings of the council were in conformity with law and that the action of the executive officers of the city was lawful in all respects, and further aver that since the letting of the contract to the successful bidder large quantities of machinery, aggregating many thousands of dollars in value, for the purpose of carrying out the terms of said contract, has been ordered under said contract and that active operations have been commenced upon said work; and the answer of the Carroll-Porter Boiler and Tank Company especially avers that the price of pipe since the letting of the contract has greatly advanced and if the contract is set aside and held for naught the city of Akron will be obliged to pay a much larger sum for the steel pipe required by it for the work contemplated; that the plaintiff, Patrick T. McCourt, was one of the unsuccessful bidders for said work, and that this action is not instituted and is not prosecuted in good faith by plaintiff; and all the defendants pray that the petition for a perpetual injunction may be refused and for other equitable relief.

In order to pass intelligently upon the questions presented, it is necessary to briefly review the proceedings had by the council and other officers of the city.

In the first place, the council passed a resolution under date of April 8, 1912, known as No. 3177, wherein it was declared by the council necessary to issue bonds in the sum of \$1,225,000 for the purpose of extending, enlarging, improving, repairing and securing a more complete enjoyment of the waterworks of the city of Akron, Ohio, and for the purpose of supplying water to said city and the inhabitants thereof. The resolution, among other things, recites that it is necessary to issue and sell bonds and that the question of issuing and selling the same be submitted to the vote of the qualified electors of

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said city at a special election to be held May 21, 1912, and that the clerk of the council be directed to transmit a copy of this resolution to the deputy state supervisors of elections.

In pursuance of said resolution a vote of the people was had, which resulted in the requisite number of electors voting in favor of the issuing of said bonds. Thereupon an ordinance, known as No. 3233, was passed on May 27, 1912, wherein, after reciting the fact that an election was held and ordaining that the bonds of said city be issued in the sum of \$1,225,000 for the purposes aforesaid, Sec. 4 of said ordinance proceeds as follows:

"The proceeds from the sale of said bonds, except the premiums and accrued interest thereon, shall be placed in the treasury to the credit of the municipal waterworks fund and shall be used for the purpose of extending, enlarging, improving, repairing and securing a more complete enjoyment of the waterworks of the city of Akron, Ohio, and for the purpose of supplying water to said city and the inhabitants thereof and for no other purpose, and the premiums and accrued interest received from such sale shall be transferred to the trustees of the sinking fund, to be applied by them in the manner provided by law."

The above-mentioned resolution and ordinance were each properly passed and published in accordance with the statute. On May 27, 1912, the ordinance in question, No. 3242, was properly passed by the city council, but was not published, which ordinance provided that the director of public service be and he is hereby authorized to enter into a contract with the best and lowest bidder, after advertisement according to law, for the construction of the following parts of the municipal waterworks plant of the city of Akron, and therein follows the particular work contemplated by the contract.

It is contended by the plaintiff that this last-mentioned ordinance should have been published, and for that reason the action of the administrative officers in letting the contract was illegal and void; that this is an ordinance of a general nature and providing for an improvement within the contemplation

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of the statute, and that it is really the determining ordinance which is a necessary prerequisite to the further proceedings; that Gen. Code 4328 provides, in substance, that an expenditure for more than less \$500 shall first be authorized and directed by ordinance of council.

The municipal code is somewhat blind as to the necessary steps to be taken when the expenditure exceeds the sum of \$500. In reference to the letting of a contract under the department of public safety, which does not differ materially from the statute under consideration, the Supreme Court, in the case of *Akron v. Dobson*, 81 Ohio St. 66 [90 N. E. Rep. 123], and reading from pages 76, 77, has this to say:

"The council provides the money for carrying on the government, either by a levy of taxes, or an issue of bonds, and it is proper that it should have some control over the expenditures; but considering these sections in the light of the purpose of the code we think their requirements are met by an ordinance making an appropriation and stating generally the purpose for which it is made, and authorizing the directors to enter into contracts to effect that purpose."

It is not possible many times in arriving at the meaning of statutes such as are found in the municipal code to give force and effect to every word and phrase used in the various sections of a series of statutes. We must take into account the general purpose of the statutes, one of which was in this case to constitute the council the legislative body and the director of public service the executive or administrative department of the city, although as to special assessments the legislature was not wholly consistent in that it is provided that the council should prepare and cause to be prepared plans and specifications, estimates and profiles of the proposed improvement, which duties are clearly administrative in their character. But nevertheless the general purpose of the statute should be observed in construing these various provisions.

It is contended by the defendants in the first place that ordinance No. 3242 was not necessary, and in the second place, that even if it was necessary there is no provision of law demanding its publication.

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The director of public service under the law is the only officer who could prepare the plans and specifications, advertise for bids and enter into the contract, because those duties are plainly administrative duties. After the council had appropriated the money in pursuance of the proper resolution of necessity and the vote of the people, the director of public service was the proper officer to take up the work from thence on and let the contract upon the approval of the board of control.

Section 4 of ordinance No. 3233 above quoted clearly appropriates the money for the improvement and for no other purpose can it be used. If in this section there had been words authorizing the director of public service to enter into the contract, no question could then be raised. What other than that could the wording of the ordinance mean? It provides that the money shall be placed in the treasury to the credit of the municipal waterworks fund and be used for the purpose of extending, enlarging, improving, repairing and securing a more complete enjoyment of the waterworks and for the purpose of supplying water to said city and the inhabitants thereof. Under the statute the money could not be expended unless the proper advertisement for bids was had and a contract entered into by the director of public service, and why, in the interpretation of this section of the ordinance should we not give it the only construction which under the law could be placed on the same, and in view of the object to be attained by the passage of the municipal code I think this ordinance may be properly termed the determining ordinance of the council.

But we need not be content with this construction placed upon ordinance No. 3233. Ordinance No. 3242, wherein it is provided that the director of public service be authorized to enter into the contract in question, was properly passed by the city council, but was not published. It is clear from a reading of the statutes that the department of public service is separate from the legislative department. The object of that portion of Gen. Code 4328 wherein it recites that the expenditure shall be authorized and directed by ordinance of council, simply means that the council give proper notification to the director

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of public service that the money is appropriated and that he, the director of public service, is then to proceed with those duties which devolve by statute upon him. If the council went further they would be invading the functions of the administrative duties of the director of public service, and, as is well said by the Supreme Court in the case of *Akron v. Dobson*, *supra*, it must have been the meaning of the legislature that after the appropriation has been made by council and the director is authorized by council, he is to proceed with the work. The sections of the statute pertaining to publication of ordinances do not provide that all ordinances shall be published, but only those of a general nature or providing for an improvement, and that is reasonable, as there is no use of going to the expense of publishing all ordinances unless the public are interested in the publicity of the same.

In this case the preliminary resolution was published, the question of whether bonds should be issued for this particular purpose was submitted to the electors of the city, the source of all power, they gave the requisite sanction for the issuing of the bonds; then followed the ordinance authorizing the issuing of the bonds and the disposal of the proceeds for the particular purpose in question. Now, with what reason can it be urged, even if ordinance No. 3242 was a necessary step to be taken in the chain of proceedings, that it should be given publicity? It could answer no rightful purpose, for the public had already been informed fully as to every step that had been taken up to that point.

I hold that the action of the council in this respect was in conformity with law.

As to the claimed infirmity of the proceedings as to the letting of the contract, the plaintiff claims that the members of the board of control secretly and unlawfully, in advance of receiving bids, determined that they would use what is known in the trade as lock bar steel pipe; that such determination by the board was without knowledge of the various bidders; that the bid of the successful bidder was for riveted steel pipe, which is a different pipe than a lock bar steel pipe; that after the bids were opened, in pursuance of said unlawful determination,

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the board switched from riveted steel pipe to lock bar pipe, without advertisement therefor; that the plaintiff, P. T. McCourt, advised said director of public service that he would furnish lock bar steel pipe and perform the labor in laying the same for much less than was the bid of the successful bidder; that one of the bidders, the T. A. Gillespie Company, was the only bidder for furnishing and laying steel lock bar pipe and that the lock bar pipe is exclusively manufactured and controlled by the said T. A. Gillespie Company, and without reciting further from the petition, the plaintiff claims that such proceedings were had by the officers as stifled competition, all of which resulted in a fraud upon the taxpayers of the city of Akron.

Many of the allegations of the petition fall to the ground when, as the evidence shows, the bid of the successful bidder was not for steel riveted pipe, but was "for furnishing and laying thirty-six inch steel pipe one-fourth inch thick." The advertisement for bids was for steel pipe delivered and laid complete.

Now, it does not matter as to how these bids were tabulated by the engineer in charge of the work; we must determine from the bid itself what it was upon. The evidence shows that "lock bar steel pipe is made by upsetting the edges of the plates and connecting them by a lock bar in the shape of an H going over the opposite edges and being forced down over them by hydraulic pressure. This takes the place of the riveting in the longitudinal joints. The circular joints may be made by riveting or otherwise as for riveted pipe. In riveted steel pipe the longitudinal as well as the circular joints of the pipe are connected by rivets. Both lock bar pipe and riveted steel pipe come within the definition of steel pipe.

It is unnecessary to lengthen this opinion by quoting from the various sections of the specifications. It is the established law that public officers in advertising for bids may call for bids upon various kinds of materials. Section 23 of the specifications in this case provides that lock bar pipe or pipe of other approved type may be used. The director of public service very properly advised the respective bidders as follows:

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"In considering the various bids received, the director will take into account not only the prices bid on the different types of construction, but also the relative strength, reliability, carrying capacity and durability of the several materials and methods of construction proposed." The director also stated that he reserved the right to reject any or all bids or accept any bid should he deem it to be for the interest of the city of Akron so to do.

The evidence shows that the board of control, who had the last say as to the acceptance of the contract, accepted the bid of the Carroll-Porter Boiler and Tank Company for the sum of \$379,391, including the work of laying the same, being the price which the company bid for steel pipe and the laying of the same, and providing further that the mill scales be removed from the plates, which, if not included in the specifications, was certainly in the interest of the city. The fact that the T. A. Gillespie Company was the only bidder who specially designated steel lock bar pipe is no reason under the ample plans and specifications why the contract could not be awarded to the successful bidder as long as it bid upon a class of material which comprised the particular kind of material accepted by the board of control. While the petition recites that lock bar pipe is exclusively manufactured and controlled by the said T. A. Gillespie Company, the evidence shows that any patents on the same have expired, and certainly it cannot be contended that because the material is manufactured by but one firm the city of any public officer having the matter in charge is thereby precluded from giving the city the benefit of that material, if it should deem it for the best interest of the city.

It is urged that mathematically the bid accepted was not the lowest bid, but in view of our statute which reads that the particular board having this in charge is not bound by the lowest bid, but the lowest and best bid, the awarding officers may take into account not only the price but the ability of the contractor to perform the work and any other considerations which should actuate public officers in the proper discharge of their duties.

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The evidence shows that the successful bidder in this case was experienced in this kind of work, and the evidence does not disclose that lock bar pipe when laid is inferior to other kinds. The determining as to which is the best and lowest bid is lodged with the officers of the city, and the court will not interfere with that discretion, unless a gross abuse of the same is manifest.

True in this case the evidence shows that if another bid has been accepted it would have been some thirty odd thousand dollars less than the one which was accepted, but the enterprise which the city is undertaking is one of vast proportions and the court cannot say but that the officers of the city have exercised the best business judgment and are to be commended rather than criticized.

I hold that this claim of the plaintiff is unfounded in law. The prayer of the petition for an injunction is refused and the petition dismissed at the costs of plaintiff.

TAXES—WILLS.

[Licking Common Pleas, April Term, 1911.]

EDWARD KIBLER (ADMN.) V. AMANDA GLYNN ET AL.

Contingent Remainder not Liable for Collateral Inheritance Tax.

The devisee of a contingent remainder is not liable for the collateral inheritance tax prescribed by Gen. Code 5331, 5332.

Kibler & Kibler, for plaintiff.

S. L. James, for defendants.

SEWARD, J. (Orally.)

This case [Edward Kibler, as administrator with will annexed of Price Glynn, deceased, against Amanda Glynn, Jennie A. Cada, and the State of Ohio] is submitted to the court upon the question whether a legacy devised in this will is subject to the collateral inheritance tax.

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It is only necessary to read the will, which is short, a copy of which is attached to the petition, to determine the matter in controversy in this case:

"I, Price Glynn of Newark township, Licking county, Ohio, do make and publish the following last will and testament, namely:

"1. I give, bequeath and devise to my wife, Amanda Glynn, for and during her life, all of my real estate, consisting of 100 acres, more or less, of land situate in said Newark township, in which we now reside, and all and singular my personal estate, money, choses in action and effects of all kinds and description; she, however, to use and dispose of such parts or portion of said personal estate, money, choses in action and effects, as she may see fit."

The court calls particular attention to the last clause of that item of the will:

"2. I give, bequeath and devise to Jennie A. Glynn, the girl who has been raised by myself and wife, in our family, and who at this date still lives with us, the remainder in fee-simple after the death of my wife in said lands, and such part or portion of said personal estate, moneys, choses in action and effects as may remain at the death of my wife."

Then he nominates Amanda Glynn to be the executrix of his estate.

The statute governing the taxation question involved in this case is Gen. Code 5331:

"All property within the jurisdiction of this state, and any interests therein, whether belonging to inhabitants of this state or not, and whether tangible or intangible, which pass by will or by the intestate laws of this state, or by deed, grant, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor, to a person in trust or otherwise, other than to or for the use of the father, mother, husband, wife, brother, sister, niece, nephew, lineal descendant, adopted child, or person recognized as an adopted child and made a legal heir under the provisions of a statute of this state, or the lineal descendants thereof, or the lineal descendants of an adopted child, the wife or widow of a son, the husband of the daughter of a

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decedent, shall be liable to a tax of five per cent of its value, above the sum of two hundred dollars. Seventy-five per cent of such tax shall be for the use of the state and twenty-five per cent for the use of the county wherein it is collected."

It is necessary to read and to refer to Gen. Code 5333 in this connection:

"When a person bequeaths or devises property to or for the use of father, mother, husband, wife, brother, sister, niece, nephew, lineal descendant, adopted child, the lineal descendant of an adopted child, the wife or widow of a son, or the husband of a daughter, during life or for a term of years, and the remainder to a collateral heir, or to a stranger to the blood, the value of the prior estate shall be appraised," etc.

Now, it will be observed that this devise is made to the widow during her natural life, with power to use such portion of it as she sees fit. The object of this collateral inheritance tax is that the persons other than those excepted, shall take the estate, less the amount of the tax which is imposed upon it by the section of the statute. It is uncertain whether the devisee of the remainder will ever get anything out of this estate. She has a contingent remainder subject to the right of the widow to use any or all of it. Suppose that the widow would see fit to use all of this property, then the devisee in remainder would get nothing; and, as I say, the object of the section of the statute is to tax those who are without the excepted class, and take the amount of tax from their share—what they would get otherwise than by the statute.

The court does not think that this collateral inheritance tax applies to this devise in this will.

A demurrer is interposed to the petition. The court does not think it necessary to pass upon that question. The demurrer raises the question as to whether it is a trust or not, and the court having found that the devise is not subject to the collateral inheritance tax, it obviates the necessity of passing upon the demurrer.

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OFFICE AND OFFICERS—SHERIFF.

[Hamilton Common Pleas, March 29, 1912.]

STATE EX REL. FALCONER V. CHARLES C. COOPER.

1. **Mandamus is Proper Remedy to Compel Reinstatement of One Excluded from the Position of Jail Matron.**

Mandamus is the proper remedy for reinstatement in office of one wrongfully ejected therefrom and to compel the issuance of a certificate for salary due and unpaid.

2. **Jail Matron is not a Public Officer.**

A woman serving as matron of a county jail by virtue of her appointment under Gen. Code 3178, not being an elector is not a public officer, but is a mere assistant of the sheriff who is charged by Gen. Code 3157 with the custody of the jail and inmates, and whose term of office expires with that of her superior, after which she can have no claim upon the office or its emoluments except through reappointment by the incoming sheriff.

DEMURRER to petition.

Charles S. Sparks, for relator:

Cited and commented upon by the following authorities: *State v. Hawkins*, 44 Ohio St. 98 [5 N. E. Rep. 228]; *State v. Bryson*, 44 Ohio St. 457 [8 N. E. Rep. 470]; *State v. Claypool*, 13 Ohio St. 14; *State v. Fire Comrs.* 26 Ohio St. 24; *State v. Sullivan*, 58 Ohio St. 504 [51 N. E. Rep. 48; 65 Am. St. Rep. 781]; *Sullivan v. Haacke*, 7 Dec. 113 [5 N. P. 26]; *Harding v. Eichinger*, 57 Ohio St. 371 [49 N. E. Rep. 306]; *Reemelin v. Mosby*, 47 Ohio St. 570 [26 N. E. Rep. 717]; *State v. Hoffman*, 35 Ohio St. 435; *State v. Darke Co. (Aud.)* 43 Ohio St. 311 [1 N. E. Rep. 209]; *Ryan v. Hoffman*, 26 Ohio St. 109; *State v. Perrysburg Tp.* 27 Ohio St. 96; *State v. Henry Co. (Comrs.)* 41 Ohio St. 423; *State v. Staley*, 38 Ohio St. 259; *State v. Moore*, 42 Ohio St. 103; *Noble Co. (Comrs.) v. Hunt*, 33 Ohio St. 169; *State v. Harris*, 17 Ohio St. 608; *State v. Nash*, 66 Ohio St. 612 [64 N. E. Rep. 558]; *Selby v. State*, 63 Ohio St. 541 [59 N. E. Rep. 218]; *State v. Barrett*, 12 Circ. Dec. 231 (22 R. 104); *Cincinnati, W. & Z. Ry. v. Clinton Co. (Comrs.)* 1 Ohio St. 77; *State v. Franklin Co. (Comrs.)* 20 Ohio St. 421; *State v. Veatman*, 22

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Ohio St. 546; *State v. Warren Co. (Comrs.)* 17 Ohio St. 558; *State v. Meiley*, 22 Ohio St. 534; *State v. Murphy*, 2 Circ. Dec. 190 (3 R. 332); *State v. Cleveland*, 10 Dec. Re. 571 (22 Bull. 113); *Reeves v. Griffin*, 4 Dec. 461 (29 Bull. 281); *Fraternal Mystic Circle v. State*, 61 Ohio St. 628 [48 N. E. Rep. 940; 76 Am. St. Rep. 446]; *Case v. Webster*, 4 Ohio St. 561; *State v. Bowers*, 26 O. C. C. 326 (4 N. S. 345), affirmed, no op., *Bowers v. State*, 70 Ohio St. 423; *State v. Robeson*, 15 Dec. 471 (3 N. S. 5).

John V. Campbell, Assist. Pros. Atty., for respondent.

GORMAN, J.

The petition in this case was filed more than a year ago. It is an action in mandamus. Plaintiff alleges that she was duly appointed as jail matron several years ago, and continued as jail matron until January, 1911; that her salary was fixed by the probate court of Hamilton county in 1906 when she was first appointed at \$50 per month, upon the recommendation of sheriff Salmon Jones, who made the appointment, and that thereafter on March 27, 1909, upon the recommendation of sheriff Henry W. Hamann, the probate court of Hamilton county fixed the salary at \$60 per month, increasing it from \$50 to \$60 per month; that from March 27, 1909, to about January 1, 1911, she continued to serve as jail matron and drew her salary of \$60 per month; that on or about January 1, 1911, the defendant, Cooper, who was the newly elected and qualified sheriff, without preferring any charge for cause, and without hearing of such charges before the probate judge of Hamilton county, and in fact disclaiming that he had any charges for cause to prefer against the relator, ordered the relator from said jail and excluded her therefrom against her protest and has not permitted her to perform her duties as jail matron since said date, although the relator has been ready and willing to perform such service at all times. The relator further alleges that on divers and sundry occasions she tendered her services as jail matron to the defendant, Cooper, since January 1, 1911. She prays that a rule may be issued to the defendant, Cooper, to show cause why he, the sheriff, should not issue a certificate to the relator

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for her salary, as the same shall become due and payable, and why he should not reinstate the relator as jail matron so that she can perform the duties enjoined upon her by law, and that upon a final hearing an order to issue such certificates and for reinstatement be made peremptory.

At the time of the filing of the petition on February 11, 1911, an alternative writ was issued, and the defendant, on coming in upon the alternative writ, has demurred to this petition, on the ground that the allegations stated therein do not set forth facts sufficient in law to constitute a cause of action.

The authority for appointing a jail matron is found in Gen. Code 3178 (R. S. 7388a). In substance that section provides that the sheriff may appoint not more than three jail matrons who shall have charge over and care for the insane, and all female and minor persons confined in the jail of such county, and the county commissioners shall provide suitable quarters in such jail for the use of such matrons. It is further provided that the appointment shall not be made except upon the approval of the probate judge, who shall fix the compensation of such matrons not exceeding \$60 per month payable out of the general fund of the county upon a warrant of the county auditor, upon the certificate of the sheriff. No matron shall be removed except for cause, and then only after a hearing before such probate judge.

The court is of the opinion that mandamus is the proper remedy in a case of this kind under Gen. Code 12283, which provides that:

“Mandamus is a writ issued, in the name of the state, to an inferior tribunal, a corporation, board, or person, commanding performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.”

The sheriff of the county is a person and if his official position requires him under the law to issue a certificate to the relator or to reinstate her as a jail matron, or both, then it would appear that he may be commanded to do this, because the doing of it is the performance of an act or acts which the law specially enjoins as a duty resulting from his office of sheriff.

Now at the outset, if the relator is entitled to be reinstated

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and to have a certificate issued to her for her salary, it must be upon the ground that she is an officer, or that the position which she has held is one which entitles her to remain as jail matron indefinitely during good behavior, and regardless of who may have appointed her in the first instance. This is her claim as the court understands it; that her appointment is for an indefinite period and that she can not be removed except upon charges being filed and a hearing had before the probate judge of Hamilton county.

It is the contention of the sheriff that the relator is not an officer, but if the court should hold her to be an officer, then that the section of the statute under which she was appointed and claims to hold is unconstitutional and void, because if she is an officer, it must be a county officer, an officer of Hamilton county, and by the provisions of the constitution all county officers must be elected and none can be appointed, so that when this section provides for the appointment of a jail matron, if the court should be of the opinion that this is an office and that she is an officer, then the legislature has undertaken to provide for her appointment in contravention of the constitutional provision which requires an election. It is further contended by the sheriff that if she be not an officer, but an appointee, either as a deputy, or under contract or appointment as an assistant to the sheriff, then her term of service expires with the expiration of the term of office of the sheriff who appointed her, and that inasmuch as Mr. Hamann's term of office expired on January 1, 1911, and the defendant, Cooper, was inducted into the office of sheriff on that date, the relator's services terminated on that day, unless she were reappointed by the defendant herein.

Now let us take up these questions in their order. I think that it must be clear in this case, that the relator is not an officer, nor did the legislature intend to make her an officer. By the provisions of Art. 15, Sec. 4, Const. of this state, "no person shall be elected or appointed to an office in this state unless he possesses the qualifications of an elector."

Article 5, Sec. 1, Const. of Ohio, provides:

"White male citizens only of the United States, of the age of twenty-one years, who shall have been a resident of the state one

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year next preceding an election, etc., shall have the qualifications of an elector and be entitled to vote at all elections."

It will be seen, therefore, that the relator does not come within the class of persons who are electors under the constitution of this state, and therefore she could not hold an office; and upon this ground, if it be contended that the position of jail matron is an office, she must fail in her contention inasmuch as she is not qualified to fill the office. It may be a consummation devoutly to be wished, and it is such in the opinion of a great many of our citizens that this provision of the constitution shall be amended so as to include females as well as males, as electors; but until this amendment does take place, women can not hold office in Ohio, and the relator in this case is unfortunate in being classified with the disfranchised portion of the citizens of our state.

Furthermore, if we are to hold this position of jail matron to be an office, and the incumbent therein an officer, then inasmuch as it is provided in Art. 10, Sec. 1, Const. that the general assembly shall provide by law for the election of all necessary county officers, and by Sec. 2 of the same article, county officers shall be elected, then this section of the statute contravenes these provisions of the constitution by providing for the appointment of an officer and it would be the duty of the court, under such circumstances, to hold the act unconstitutional.

It was held in the case of *State v. Brennan*, 49 Ohio St. 33 [29 N. E. Rep. 593], that an act of the legislature "which makes provision for the appointment by the clerk of the court of common pleas of a stationery storekeeper for Hamilton county, and devolves upon such storekeeper the duty to purchase and have charge of all blank books, stationery, printing and office appliances for the offices of that county, fixing an annual salary of \$1,500, to be paid by the county treasurer from the general fund of the county, and requiring a bond in the sum of \$5,000 for the faithful performance of his duties, is an attempt upon the part of the legislature to constitute a county office and provide for the filling of the same for a full term by appointment and that such act is in contravention of Sections 1 and 2 of Article 10 of the constitution, which requires that all county officers shall be elected, and is therefore void."

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It was also held in *State v. Halliday*, 61 Ohio St. 171 [55 N. E. Rep. 175], that:

"The office of county warden created by Sec. 409 Rev. Stat. is a county office, and can not be filled by appointment, Art. 10, Sec. 2, Const."

In that case where a mandamus was sued out to compel the auditor of Franklin county to draw his warrant on the treasurer of the county for the payment of certain fees claimed to be due in a prosecution instituted before a justice of the peace by one Terry, fish and game warden of the county, it was held that the writ would not lie, because Terry held his office by appointment and not by election, and that he was not an officer and that the act under which he was appointed was unconstitutional.

In this case as in every other case in which the construction of an act of the legislature is involved, it is the duty of the courts to uphold the constitutionality of the enactment unless it be clearly in contravention of some provision of the constitution. The court will endeavor also to avoid holding an act unconstitutional if a construction can be placed upon the act which will enable it to stand, and at the same time give force and effect to the intent of the legislature in passing the enactment. Now in this case, I am of the opinion that it was not the intention of the legislature to create the office of jail matron, but rather it was the intention of the legislature to provide for an assistant to the sheriff, or a deputy of the sheriff, if we may please to call it that, and an examination of the sections of the General Code applicable to jails and the inmates thereof will disclose that the legislature did not contemplate making an office of the jail matron. By the provisions of Gen. Code 3157, the sheriff shall have charge of the jail of the county, and all persons confined there, keep them safely, and attend to the jail, and govern and regulate it according to the rules and regulations prescribed by the court of common pleas.

Now if the sheriff is the custodian of the jail and the persons therein confined, as this section provides, how can he be relieved of the duties resting upon him by appointing a jail matron or three jail matrons, as he has the right to do under Gen. Code 3178? There is no doubt that the sheriff is an officer, and a

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constitutional officer at that. This section provides that the sheriff may appoint not more than three jail matrons, who shall have charge over and care for the insane, and all female and minor persons confined in the jail. But by the provisions of Gen. Code 3157, the sheriff shall have charge of all persons confined in the jail and shall safely keep them; shall attend to the jail and govern and regulate it.

It seems to the court that Gen. Code 3178, read in connection with Gen. Code 3157, if they are both allowed to stand, must be construed to mean that the matron or matrons whose appointment is provided for shall be subordinate to the sheriff and perform their duties under his direction and control. The legislature does not appear to have made it obligatory to appoint a jail matron, but has made it discretionary. The language is "may appoint" not "shall appoint," or "must appoint"; so that the necessity for the appointment of one or more jail matrons in the exercise of good faith, sound judgment and with a view to public economy, should be measured by the necessity for a jail matron. In some counties it might not be considered necessary to have a jail matron, and we conceive it to have been the intention of the legislature to leave the appointment of a jail matron to the sound discretion of the sheriff, and the number of matrons not to exceed three to be appointed, was also left to his discretion. So that whether the matron be designated as a deputy sheriff or as an assistant to the sheriff, or as an appointee of the sheriff, it appears to the court that it can make no material difference as to her tenure. It has been decided in numerous cases in this state that a position similar to that of jail matron is not an office, but merely a deputy or employee.

In the case of *State v. McGonagle*, 26 O. C. C. 685 (5 N. S. 292), an action in *quo warranto* was brought by a person claiming to be superintendent of a county children's home, under R. S. 930 (Gen. Code 3084). In this statute it was provided that the board of trustees of the children's home shall designate some suitable person who shall act as superintendent of said home, who shall also be clerk of said board of trustees and shall receive for his services such compensation as the board of trus-

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tees designate at the time of appointment. He shall perform such other duties, and give security for the faithful performance of them, as the trustee may direct. It was held by the court in this case that the office of superintendent was not a public office and that the court had no jurisdiction in *quo warranto* proceedings brought by the relator.

In the case of *State v. Taylor*, 16 Dec. 66 (3 N. S. 505), it was held by Judge Dillon, of the court of common pleas of Franklin county, that an assistant prosecuting attorney is not an officer in the sense that the word is used in the state constitution, but that he is a person authoritatively appointed to assist an officer in an office provided by law.

We think that the reasoning of the learned judge in this case would apply with great force to the case at bar; that the jail matron is a person authoritatively appointed to assist an officer—the sheriff—in an office—the office of sheriff—provided by law. The court held that the fact that the assistant prosecuting attorney is required to take an oath of office and perform many of the duties imposed by law upon the prosecuting attorney, does not, nevertheless, constitute the assistant prosecuting attorney an officer.

In the case of *Brady v. French*, 9 Dec. 195 (6 N. P. 122), decided by Judge Rufus B. Smith, of the superior court of this city, it was held that, where the county treasurer appointed a collector of delinquent taxes under Gen. Code 5696, authorizing the county treasurer to employ collectors of delinquent taxes upon personal property, that the appointee is merely a deputy treasurer and holds his appointment only so long as his principal holds. In that case, Brady was appointed by John C. Roth, county treasurer, and he entered upon the discharge of his duties with Roth, treasurer, in September, 1908. About two months after Mr. Roth took his office as treasurer, he met his death by accident, and his successor, Tilden R. French, was appointed by the commissioners of Hamilton county. It was contended on behalf of Brady that by virtue of his appointment and contract with Roth, treasurer, he was entitled to hold his position for a period of two years. Judge Smith found in that

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case that Brady was only a deputy and that his term of service could continue no longer than that of his principal.

Gen. Code 9, among other things, provides that a deputy or clerk, appointed in pursuance of law, shall hold the appointment only during the pleasure of the officer appointing him. So that, if the relator shall be considered as a deputy of the sheriff, she can hold no longer than her principal, and when he laid down the duties of his office upon the expiration of his term, she had no further right to retain her position, except by reappointment by the new sheriff.

In the case of *State v. Kendle*, 52 Ohio St. 346 [39 N. E. Rep. 947], it was held by the Supreme Court that the jury commissioners of the county appointed by the judges of the court of common pleas of the district were not officers, and therefore the act providing for their appointment was not in contravention of any of the provisions of the constitution. On pages 355 and 356, the court says:

"It is also claimed that the statute is invalid, because it provides for the appointment of the members composing the commission, instead of their election by the electors of the county, as is required in the case of all county officers by Art. 10, Sec. 2, Const."

But the court held that they were not officers. On page 356, the court says:

"The power of the legislature to provide for the appointment of persons to act as assistants in an office filled by election has not, and can not well be questioned. It is on this principle that the appointment of deputy clerks, deputy sheriffs, and so forth, are made and recognized, each of whom perform many, and in some cases all, the duties of the office in which he acts as deputy. So as to these jury commissioners. They are appointed by the common pleas judges to assist in the administration of justice, as are master commissioners and court constables. They are but handmaids of the court in the selection of judicious and discreet persons to serve on such juries as are required in the trial of causes, and the presentment of indictments."

The reasoning employed by the court in this case may well

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be applied to the case at bar. The appointment of the jail matron as an assistant in the administration of the office of the sheriff, taking care of the inmates of the jail, especially those who are unfortunate, being insane or minors, or of the women therein, is but a handmaid of the sheriff.

In the case of *State v. Jennings*, 57 Ohio St. 415 [49 N. E. Rep. 404; 63 Am. St. Rep. 723], an action in *quo warranto*, it was held that where an ordinance of a municipality provided for a fireman and defined his duties requiring him to take an oath of office, give bond and perform such duties as are usually performed by a chief of a fire department paid by the month for his services out of the public treasury, is not a public officer, and notwithstanding the length of the term of his appointment, he could not be ousted on the ground that he had not been appointed by the mayor and confirmed by the council. He was held to be a mere appointee or assistant.

In the case of *State v. Shaffer*, 18 Dec. 303 (6 N. S. 219), it was held that the position of a court constable or a court bailiff is not an office and that the incumbent thereof is not an officer, although he is appointed by the court, required to take an oath for the performance of his duties and perform very grave duties in assisting the court in the administration of justice. Judge Killits, now on the federal bench, decided this case, and held that neither the position of a deputy sheriff nor court constable is a public office.

In the case of *Theobald v. State*, 30 O. C. C. 414 (10 N. S. 175), before the circuit court of Montgomery county, the opinion being announced by Judge Smith of our own circuit court, he defined an officer in the sense in which the word is used in the constitution of Ohio, as an individual who takes the oath of office and becomes responsible to the public for his own official acts and those of his subordinates.

Now if we apply this rule to the case at bar, the relator in this case was not primarily responsible to the public for the performance of her duties, but to the sheriff, and he is the only one under the statute who had the power to prefer charges for a hearing before the probate court to remove her.

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A very strong case, in fact one much stronger than the case at bar, is the case of *Palmer v. Zeigler*, 76 Ohio St. 210 [81 N. E. Rep. 234], in which the Supreme Court held that:

"The superintendent of a county infirmary is not the holder of a public office within the meaning of R. S. 6760 (Gen. Code 12303), and *quo warranto* is not the proper remedy to oust him from office."

By the provisions of the statute a superintendent of a county shall be appointed by the directors of the county infirmary and he shall reside in some apartment of the infirmary. He shall receive compensation for his services to be determined by the directors of the county infirmary, and can not be removed by the directors of the infirmary, except for good and sufficient cause. He is required to receive all persons into the infirmary, to make elaborate reports, take an oath of office, give bond for the faithful performance of his duties, to receive and collect money, account for the same, take charge of inmates, and perform a great many duties such as officers ordinarily perform. In this case a superintendent had been appointed by a former board of directors of the infirmary, and he claimed the right to hold over after a new board of directors of the infirmary was inducted into office, just as the relator in this case claims the right to hold after the new sheriff took office. The new directors of the infirmary appointed Zeigler, and Palmer, the incumbent, resisted Zeigler in taking possession of the infirmary buildings and property. The court held that the superintendent of the infirmary is a mere employe or contractor under oath and bond, limited on all sides in his authority, and that upon the expiration of the term of office of the directors who appointed him and the induction of new directors of the infirmary into office, he was not entitled to hold his position except by the appointment, consent or acquiescence of the new directors. Notwithstanding the provision of the statute which requires that the superintendent of an infirmary shall not be removed by the directors except for good and sufficient cause, the Supreme Court in this case, on page 227, disposes of that proposition in the following language:

"However, if he was a public officer, he was such only dur-

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ing the term for which he was appointed, which ended on the first day of April, 1905. On that day Zeigler was entitled to take possession, and Palmer no longer had title or color of title to the position. He became a trespasser when he refused to yield possession and retire. He was not removed from office, but his term had expired and therefore no reasons were to be assigned, as in case of removal."

In the case at bar, the sheriff takes the position that by the expiration of the term of office of Sheriff Hamann, the matron's term of appointment also expired and that she was not removed, nor was it necessary to remove her. She simply has ceased to be a matron by the expiration of the term of her superior officer. Her appointment fell with the expiration of the term of the sheriff who appointed her. So that it was not necessary to remove her, nor was it necessary to prefer any charges in the probate court or to have a hearing thereon.

It has been suggested that some force must be given to the language of the state, Gen. Code 3178, which provides for preferring charges and a hearing before the probate court.

We think that the construction suggested by counsel for defendant is the correct one with reference to this part of the statute. That during the term of the sheriff who appoints the matron, the matron appointed by him can not be removed from her position without charges being preferred and a hearing had in the probate court. But this rule does not apply when the sheriff who appoints the matron has become *functus officio*, and with the expiration of his term of office, all of his deputies, appointees, clerks and assistants come to the close of their tenure.

This we think is the proper construction to give to this language, in view of the statute, Gen. Code 9, and other authorities that might be cited.

It is said in 29 Cyc. 1395, under the title of "Officers":

"Deputies, whether common law or statutory, are, where their terms are not fixed by statute, supposed to be appointed at the pleasure of the appointing power, and their deputation expires with the office on which it depends. Deputies must, from this point of view, be distinguished from assistants to whom a fixed term has been given by law."

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Now in the case at bar, no fixed term is given to the matron, and it would seem that her tenure is analogous to that of a deputy who holds without any fixed term.

Throop, Pub. Off. says:

"A deputy's commission in the absence of any statutory provision to the contrary, runs only while the principal's term lasts; if the principal is re-elected or reappointed the deputy must be appointed anew."

The sheriff of this county holds his office for two years and his deputies, clerks and appointees can hold no longer than he holds without the consent, acquiescence or appointment of his successor. It would indeed be an anomalous situation for the legislature to authorize one officer to appoint for an indeterminate or indefinite period a person as deputy or assistant and foist that deputy upon his successor without his consent, without his approval, in face of the fact that the person might be obnoxious to his successor, although subordinate to the officer, in the performance of his duties.

Furthermore, it is a grave question whether or not the relator in this case would be entitled to have a mandamus issue to require the sheriff to issue to her a certificate for her salary upon this ground. It is held in this state that the compensation to be paid to an officer depends upon the performance of the duties and that when no services have been performed, no compensation can be paid, and this regardless of the fact that the officer might have been ready and willing to perform, but was prevented from performing his duties by a superior officer.

It was held by the Supreme Court in the case of *Steubenville v. Culp*, 38 Ohio St. 18, the opinion announced by Judge Longworth, that, a police officer suspended from office by a mayor of a city under authority granted to the mayor to do so, is not entitled to wages during the period of such suspension, notwithstanding the fact that council afterward declared the cause of suspension insufficient. On page 23 Judge Longworth says:

"Was he entitled to wages during this period? (During period of suspension.)

"In *Smith v. Mayor*, 37 N. Y. 518, it was held that no

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claim could be brought for salary or perquisites against a municipal corporation, covering any period when the complainant was not actually in office, for the reason that salary and perquisites are the reward of express or implied services, and therefore can not belong to one who could not lawfully perform such services.

"To this extent the doctrine of the case cited was announced in *Auditor v. Benoist*, 20 Mich. 176 [4 Am. Rep. 382]; *Shannon v. Portsmouth*, 58 N. H. 183; *Attorney-General v. Davis*, 44 Mo. 131; and is clearly laid down and justified in the later case of *Westberg v. Kansas*, 64 Mo. 493. Indeed, I have been unable to find any case in which a contrary rule has been upheld. Officers are held, in this country, neither by grant nor contract, nor has any person a vested interest or private right of property in them."

Our circuit court in the case of *State v. Eshelby*, 1 Circ. Dec. 592 (2 R. 468), approved and followed this decision of *Steubenville v. Culp*, *supra*. This last case was an action in mandamus by the relator, Cronin, to require the city to pay him the sum of \$1,500 salary as wharfmaster. Cronin was appointed wharfmaster by the city council. In the spring of 1885 after Cronin's appointment, one Carson was elected by the people as wharfmaster. Cronin brought an action in *quo warranto* against Carson, and the Supreme Court ousted Carson and held that Cronin was entitled to the office, and reinstated Cronin in the office. Cronin then brought suit for the salary during the time that Carson occupied the office and the circuit court held that although Carson wrongfully held the office, he drew the salary and Cronin could not recover from the state.

So that in the case at bar I am of the opinion that the relator, not having performed the duties of jail matron since January 1, 1911, is not entitled upon this ground to a mandatory order directing the sheriff to issue to her a certificate for her salary.

Nor should a mandatory order be issued to the sheriff to reinstate the relator for this reason: it appears that under the section of the statute providing for the appointment of jail matrons, the appointment must be approved by the probate

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court, and the compensation of the appointee as jail matron shall be fixed by said court at not exceeding \$60.

Now there is a discretion vested in the probate judge of the county to approve the relator's appointment and to fix her salary, and it has been universally held that a writ of mandamus will not lie to compel an officer to perform an act which is discretionary or in which he has a right to exercise a discretion. It would be useless to issue a mandatory order to the sheriff to reinstate the relator in this case unless the judge of the probate court could also be compelled to approve her appointment and fix her salary. It is not sought in this proceeding to do this, but even if it were, it has been held in the case of *State v. Robson*, 15 Dec. 471 (3 N. S. 5), by Judge Allread of the common pleas court of Darke county, that a mandamus will not lie to compel a judge of the probate court to approve the appointment and fix the salary of a jail matron. It was sought in that case to mandamus the judge of the probate court to approve the appointment made by the sheriff of a jail matron, and to fix her salary, upon the averment that the probate judge of the county refused to approve her appointment or fix her salary. The ground upon which this decision rests is that courts have no authority in the absence of the abuse of discretion, to control or direct a defendant in the exercise of a discretion confided in him by law.

It would seem, therefore, that upon the two latter grounds also a mandamus should not issue in this case.

The judgment of the court, therefore, is that the demurrer to the petition will be sustained on the ground that the allegations thereof do not state facts sufficient in law to constitute a cause of action.

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ERROR—NEW TRIAL—NEGLIGENCE.

[Clermont Common Pleas, October, 1910.]

GEORGE W. ARMSTRONG v. C. M. & L. TRACTION CO.

1. **Jury Has Exclusive Province in a Case Involving Different Conclusions Reasonably to be Reached From the Evidence.**

In an action for personal injuries in which the evidence with reference to a collision between an electric car and a vehicle is such that more than one view may be taken as to the responsibility of the motorman therefor, and in consequence of which different minds may reasonably arrive at different conclusions, the verdict of the jury is invulnerable so far as the weight of the evidence is concerned.

2. **Assuming Crux of Case as Undisputed Fact Erroneous Instruction.**

Giving a special charge to the jury which assumes as an undisputed fact the question which forms the very crux of the case is erroneous.

Motion for a new trial.

BAMBACH, J.

The verdict in this case has been vigorously denounced as an assault upon plaintiff's rights.

The case has had a checkered career. It has been four times tried in this court, resulting in two disagreements, a verdict for the plaintiff for approximately \$10,000, and the present verdict for the defendant.

The judgment rendered upon the verdict for the plaintiff was reversed by the circuit court, upon grounds other than the weight of the evidence. •

This history of the case should seem to indicate, either that the case is close upon the facts, or that it is beset by some exceptional difficulty.

The act charged against the defendant is, that its motorman drove a large box freight car, propelled by electric current, upon and against a one horse cart in which the plaintiff was seated, with force and violence and without giving him time and opportunity to avoid a collision. The negligence charged is of a positive character, namely, it is said to have been wrongful and willful. The freight car is said to have been run against

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the cart with great force, without giving the driver time and opportunity to clear the track on which the freight car was being operated; that the motorman saw, and could, by the exercise of ordinary care, have seen when the freight car was seventy-five feet from the horse and cart, that the horse was frightened by the approach of the car and the noise it was making and was backing towards and on to the street car track, and was beyond the control of the driver, and about to back the cart on which plaintiff was seated in front of the freight car; and that the defendant well knowing, and having the means of knowing, etc., that the freight car would run against and collide with the horse and cart, unless checked and slowed down, and having sufficient time, opportunity and means to stop the car, wrongfully and negligently ran and drove the car on and against the cart with great force, etc., without allowing the plaintiff time and opportunity to escape and prevent the collision; whereby he was thrown from the cart near the left front wheel of the car and had his arm crushed, necessitating its amputation.

The answer is a general denial of the facts stated as the cause of action; and charges further, that the injury complained of is the result of the negligence of the plaintiff and of persons other than the defendant.

A reply denies the allegation last aforesaid.

The plaintiff testified that for some thirty-five or forty feet the cart, in which he and a boy were at the time seated, was being backed by the horse, who had taken fright at the approaching freight car, up the track away from the car with one wheel on the inside of the rail, and that the motorman could easily have seen his predicament, but notwithstanding he did not stop the car, but ran it against the cart, and thus caused the injury.

The cart was in charge of James Dennison, who invited the plaintiff to a ride. Dennison knew that the horse was "a backer," but there was no evidence of a direct nature that the plaintiff knew of this vice of the horse, but the evidence did show that he was an experienced teamster.

The motorman testified that he did not know of the perilous situation of the plaintiff, and had no intimation that he was in any danger, until he saw his head near the window of the vesti-

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bule. The vestibule was not provided with lights to the sides so as to permit of a lateral view by the motorman, but this fact is not relied on as a cause contributing to the injury, and need not, therefore, be considered.

There were some eight witnesses who gave their account of the transaction. The testimony conflicts as is usual in such cases, where excitement, haste, confusion and tragedy confuse the powers of perception and impair the memory. There was no reason to believe that any witness had willfully falsified. There is no evidence of physical conditions which would point with greater certainty to the true situation and sequence of events. The imprint of the cart wheel on the freight car is not of that character.

Whether the accident resulted from the sudden turning and backing of the horse at the moment of time when the freight car, moving at the rate of about three and one-half miles an hour, passed the cart, so that the collision could not reasonably have been foreseen; or, whether, by the exercise of reasonable and ordinary care, the motorman might have stopped the car after seeing the perilous situation of the plaintiff or after he should have seen it by the exercise of such care he could have averted the injury, may well be said to be within the realm of probability, from the evidence, if determined either way.

Therefore, different minds believing the one theory of the evidence, or the other, may well arrive at different conclusions. And this accounts for the disagreement and the conflicting verdicts.

In such case, the rule of the law is well understood and of constant application, which forbids the court from interfering with the verdict, where it is not clearly against the evidence. *McGatrick v. Wason*, 4 Ohio St. 566.

Guided by this rule the verdict, upon this ground, is invulnerable.

The special charge No. 10 asked by defendant and given, said to the jury that it is not negligence if the motorman failed to stop or slacken the speed of the car, running at an ordinary speed, upon seeing the cart and horse standing at the side of the track, the horse being uneasy and showing signs of fright,

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if a full grown man was sitting in the cart, and another full grown person was standing in the street holding the horse by the head, and had full control of it, until the horse suddenly backed on the track in front of the approaching car.

The special charges asked by the defendant were not discussed. It seemed that no serious fault was found with them by opposing counsel, though my recollection is that they excepted to the giving of the specials and counsel for defendant excepted to the ruling upon those which were refused.

A review of this special charge satisfies me that it was error to give it.

It was for the jury to say whether the evidence proved that the horse backed the cart along the track in front of the car and partly upon the track, where he could and should have been seen by the motorman, as plaintiff claimed, or whether the horse suddenly backed on the track in front of the approaching car as claimed by the defendant.

The evidence on this point was in conflict, and in this dilemma the court says it is not negligence in one aspect of the case when two full grown persons had the horse under control until he suddenly backed on the track in front of the car. The very crux of the case was assumed. The charge was not qualified, if they should find the facts to be thus proven.

The charge assumes the fact to be as the defendant claimed it to be, and the jury so found. What would have been the verdict if this charge had not been given no one can say. Where an erroneous charge is given, it will be presumed that the jury was thereby influenced to the prejudice of the party against whom the error was committed. *Lowe v. Lehman*, 15 Ohio St. 179.

It is highly desirable that this case should be ended; but in face of the presumption of prejudice accruing to the defeated party by an erroneous charge, the motion for a new trial is granted.

Telephone Co. v. Marble Works.

PLEADING—PRINCIPAL AND SURETY.

[Hamilton Common Pleas, March, 1911.]

CITY & SUBURBAN BELL TEL. CO. v. GREAT WESTERN MARBLE WORKS.

Averment that Due Notice of Default of Principal was Given Surety on Contract of Indemnity Held Insufficient.

In an action on a contract of indemnity which stipulates how notice of default shall be brought home to the defendant surety, averments should be made which will inform the defendant as to when the plaintiff first became aware of the liability of the defendant through the default of his principal and also the date when this information was communicated to the defendant by the plaintiff, averment that due notice was given is insufficient.

David H. Scott, for plaintiff.

Peck, Shaffer & Peck, for defendant.

WOODMANSEE, J.

The motion of defendant to require plaintiff to make its petition more definite and certain is granted.

When a petition filed on a contract alleges that all the conditions of the contract incumbent upon the plaintiff have been complied with, it meets the requirement of the code with reference to conditions precedent, but does not apply to conditions subsequent, which often form the basis for plaintiff's right of recovery.

The court is of the opinion that it is not exacting too much of a pleader to require him to set out any allegation pertinent to the issue that would really decide a whole case upon demurrer, rather than the point be raised at the hearing of the case when it comes up for trial. The speedy and orderly administration of justice would suggest the former procedure rather than the latter. Otherwise the pleader could withhold the allegation of a fact that would be fatal to his cause of action, and which he must know would be disclosed at the hearing; besides, if the particular fact were called to the attention of his client his affidavit to the pleading would indicate that the point in question was brought home to him, whereas, the general

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allegation in a pleading that all the conditions have been complied with does not mean much to the ordinary litigant who swears to the pleading.

A copy of the contract sued on in this action is attached to the petition and made a part of it. It is a contract of indemnity and it stipulates how a notice shall be brought home to the defendant to make it liable on the contract, and while the petition alleges that due notice was given to the defendant under the contract, the defendant is entitled to know the date when plaintiff first had knowledge of the fact that the defendant was responsible to the plaintiff because of the alleged default of defendant's principal and is also entitled to know the date when this information was communicated to the defendant.

Motion granted.

BANKS AND BANKING—TRIAL.

[Hamilton Common Pleas, June, 1911.]

JON CEREGUTI V. PEOPLES BANK & SAVINGS CO.**Negligence of Bank Paying Money to Wrong Person Fact for Jury.**

Where money on deposit has been paid by a bank to wrong person, the question whether the bank is relieved from liability for the error on the ground that it exercised reasonable care is one for the jury.

Galvin & Bauer, for plaintiff.

Cohen & Mack, for defendant.

SWING, J.

This case is submitted to me upon a motion by defendant for a judgment in its favor notwithstanding the verdict of the jury in favor of the plaintiff. It was contended in argument by counsel for the defendant company that the evidence showed clearly that the defendant company in paying out the money of the plaintiff on deposit, by mistake to another person, acted with reasonable care under all the circumstances and that the defendant company is therefore not liable and is entitled to a

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judgment in its favor. At the trial I submitted to the jury the question as to the exercise of reasonable care by the defendant company in the payment of the money. The jury returned a verdict for the plaintiff, and in an answer to special interrogatories found that the defendant had not exercised reasonable care.

The question is difficult. When I first learned the facts in the case, I was under the impression that the defendant company had acted with reasonable care, but after hearing all the evidence and carefully considering the case, I was of the opinion that the question of the exercise of reasonable care by the defendant was a proper question to submit to the jury. Upon further reflection, while I am still somewhat uncertain in mind about it, I am, upon the whole, still inclined to the opinion that it was a proper question for the jury, and the jury having found for the plaintiff upon the question, I do not feel warranted in entering a judgment for the defendant notwithstanding the verdict. I think it a question about which reasonable minds might differ, but that probably the finding of the jury is the more reasonable view, and the view more likely to be taken by impartial minds. This is the third trial of the case. In the second trial before my colleague, Judge Hunt, and a jury, the issue was presented to the jury as in this case. It is quite certain that the question will have to be finally determined by the higher courts and I am of opinion that so far as this question is concerned, it should proceed to such determination without further jury trial.

The motion for a judgment notwithstanding the verdict will therefore be overruled.

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INJUNCTION—WORK AND LABOR.

[Hamilton Common Pleas, June 5, 1912.]

PH. MORTON V. BROTHERHOOD OF PAINTERS, ETC., ET AL.**Blanket Injunction Will not be Issued as Scarecrow Against Unnamed Members of Labor Union or Against Individual Members, Except upon Hearing**

A court of equity, in carrying out its recognized duty of refusing to permit either employer or employe to terrorize the other, must also refuse to permit that it be itself made a scarecrow by issuing an injunction for the purpose of frightening either side; hence, a blanket injunction will not be issued against a labor union for the purpose of restraining its unnamed members from committing offenses, nor against individual members of a union except upon hearing; if the circumstances are such as to require the issuance of such an order without notice, the reason therefor must be of sufficient force to require that it be set forth in an entry.

Frank M. Coppock, for plaintiff.

Nicholas Klein, for defendants.

DICKSON, J.

It is claimed that certain unions by resolution ordered certain illegal means to be taken to injure the business of the plaintiff—one Morton, a sign painter—and for this reason the court is asked to issue an injunction against a union and thus by service on its officers to restrain its members from committing offenses, and thus if any member of the union violate such an order, hold him in contempt of court and punish him therefor; and this court also is asked to permit the plaintiff herein to publish by posting throughout the vicinity such an order, to the end that any one violating the order may be punished for contempt of court.

The union as such is a lawful body possessed of certain rights and duties. The union as such has no authority to bind its members by resolving to commit offenses. When members of a union threaten to commit or do commit offenses, they are acting as individuals, and they can not be compelled to do such wrongs by any resolution or any act of the union. Nor can they, if they commit an offense, hide behind any order of the union.

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In the matters complained of this court has no authority to enjoin the union. It can not in these matters punish the union. It can not serve summons on the members of the union by proclamation. It is not proper for a court to violate the law to prevent the law being violated. The court should not permit itself to be used as a scarecrow. It is not wise for a court to make an order which it can not carry out; indeed, it has no power so to do. No court has a right without a duty, and the duty here lies in doing complete legal justice and without fear. This court is not a police court. We know as a rule persons who commit offenses as individuals and by name. This court has power to restrain individuals who threaten to injure property rights. It has no power to restrain the commission of crimes or offenses against the state. This power is with the police department. This court will not permit the employer or the employe to terrorize the other, nor will it permit either to obtain any writ for the mere purpose of terrorizing any one.

In contempt proceedings the offense and the offender should be definite and certain and the punishment or discharge certain and sure. This court will not permit any one to obtain an injunction without a hearing, nor will it permit a temporary restraining order unless notice to the other side be given or a good reason be given for its omission, and a reason of sufficient force to require an entry setting forth the reasons therefor, so that all may know the same and so that punishment for contempt may be inflicted if the court has been deceived in omitting notice.

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MASTER AND SERVANT—NEGLIGENCE.

[Stark Common Pleas, March 31, 1913.]

WILLIAM ZUMKEHR, BY HIS NEXT FRIEND, ETC., v. DIAMOND
PORTLAND CEMENT CO.

1. Workmen's Compensation Act Abrogating Assumption of Risk and Fellow Servant Doctrine is Constitutional.

The provisions of Sec. 21-1 of act 102 O. L. 529 (Gen. Code 1465-60), the Workmen's Compensation act, abrogating the common law defenses of contributory negligence, assumption of risk and the fellow-servant rule, are not in conflict with any constitutional guaranty.

2. Workmen's Compensation Act Precludes Pleading Defense of Contributory Negligence as Complete Defense or as Comparative Negligence.

Under the provisions of act 102 O. L. 529, in an action by an employee for damages for injuries alleged to have been caused by negligence of the defendant, his employer, since January 1, 1912, where it is admitted that the defendant employs five or more workmen or operatives and has not paid into the state insurance fund the premiums provided by the Workmen's Compensation act, such defendant cannot be permitted to plead contributory negligence in its answer, either as a complete defense or as comparative negligence in mitigation of damages under favor of the Norris act (101 O. L. 195).

[Syllabus approved by the court.]

DEMURRER to answer.

Rice & Souers, for plaintiff.

Guthery & Guthery and *McCarty & McClintock*, for defendant:

Cited and commented upon by the following authorities: *Miller v. Kyle*, 85 Ohio St. 186 [97 N. E. Rep. 372]; *State v. Phillips*, 85 Ohio St. 317 [97 N. E. Rep. 976].

DAY, J.

The question raised by this demurrer is as to the right of the defendant to plead in its second defense in the answer facts constituting comparative negligence, when it is admitted that the employer does not contribute to the state insurance fund un-

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der the Workmen's Compensation act, and employs more than five men.

The Workmen's Compensation act provides that a defendant who employs more than five men in the same line of work, and who does not contribute to the state insurance fund for the benefit of injured employees, shall not have the right to avail himself in case of personal injury, or death, by reason of the wrongful act of the defendant, of the following common law defenses: 1. Contributory negligence. 2. Assumed risk. 3. The fellow-servant doctrine.

It is contended by this defendant that even though the act in question denies the defendant the right of the common-law defense of contributory negligence, yet he may avail himself of the doctrine of comparative negligence as provided in the Norris act. In other words, that this doctrine of comparative negligence is a statutory provision, and has been recognized by the courts of Ohio; that it is not the so-called principle of contributory negligence, but stands upon a footing of its own; and that by virtue of the Norris act, unrepealed, it is still the law of Ohio.

My attention is called to the case of the *Standard Steel Tube Co. v. Prusakiewicz*, 33 O. C. C. 133 (15 N. S. 21). The effect of the doctrine of comparative negligence is to enlarge the right of action by an employee so as to include cases where he may have been guilty of contributory negligence, provided his contributory negligence is slight in comparison with that of the defendant, or the employer. This case was decided November 25, 1911, prior to the taking effect of the Workmen's Compensation act under consideration. The effect of that case is to establish the principle and the doctrine of comparative negligence as a fixture in the law of Ohio, and by the effect of the Workmen's Compensation act its existence is not rendered less secure.

It seems to me the solution of this question is best reached by a consideration of what is the common law doctrine of contributory negligence.

Contributory negligence in its legal significance is such an act or omission on the part of the plaintiff, amounting to a want

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of ordinary care, as concurring or cooperating with the negligent act of the defendant, is the proximate cause of the injury complained of or in some degree contributes thereto. The general effect of contributory negligence, by the universal rule, was, that if negligence on the part of the party injured contributed to the injury he was not entitled to recover.

From this definition it is deducible that before there can be contributory negligence, there must be negligence upon which to base the same.

Now, what is comparative negligence? Comparative negligence arises where there has been negligence upon the side of the defendant and upon the side of the plaintiff contributing to the injury, and a comparison of the negligence of the respective parties shows a lesser degree of negligence on the part of the plaintiff than the defendant in order to entitle the plaintiff to recover.

Now this defendant in the case at bar seeks to take advantage of the doctrine of comparative negligence as established by the Norris act. Before there can be comparative negligence there must be contributory negligence upon which to found it. By the Workmen's Compensation act the common law doctrine of contributory negligence has been eliminated in certain classes of cases, among which is the case at bar.

Assuming it to be a fact that this company does not contribute to the Workmen's Compensation act, and employs more than five men, and I understand for the purposes of this question that is admitted, and, at any rate, it is averred in the petition, now would it be logical to say that the foundation of comparative negligence having been eliminated by the statute, that the superstructure has not fallen? I think not. When the legislature saw fit to eliminate contributory negligence from a damage suit as a defense, whatever was built upon the doctrine of contributory negligence must necessarily fall with it.

This has been the view of two common pleas judges in Ohio, that of Judge Stroup in the case of the *Elyria Iron & Steel Co. v. Taylor*, and of Judge Pierson in the case of *Gerenkr v. Kirk-Latta Manufacturing Co.*; the conclusion of both courts being that in a case where a defendant sought to avail himself of the

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doctrine of comparative negligence as established by the Norris act, he must be a contributor to the Workmen's Compensation act insurance fund and comply with its provisions.

Now, it is said that by reason of the case that I have cited above from the circuit court, decided in November, 1912, that this doctrine of comparative negligence being a fixture in the law of Ohio, and the Norris act not having been repealed, the Workmen's Compensation act cannot therefore eliminate it.

Now, by the Workmen's Compensation act, when a defendant has complied with the law as to a contribution to the fund, and employs more than five men, then he gets the full benefit of the doctrine of the Norris act; and while he has not the benefits of the fellow-servant doctrine and of the common law doctrine of contributory negligence, and the law of assumed risk, when he has not yet contributed, yet, when he has complied with the provision of the Workmen's Compensation act the doctrine of comparative negligence is still available to him; but only is it available to him when he complies with the provisions of the Workmen's Compensation act. The Norris act is not repealed. The two may be construed in harmony. And if this can be done, if force and effect can be given to both statutes, it is the duty of a court to give it.

Now, my attention has been called to the doctrine that this is a statute in derogation of the common law and therefore should be strictly construed. Indeed I think a strict construction of the act itself, which its plain phraseology requires, would lead one to the conclusion which I must reach in this case; that is, that this demurrer should be sustained, in order to give force and effect to both statutes; and if a construction can be found which gives force and effect to both statutes, it is the duty of the court to apply that construction.

I would be at a loss to understand how a more strict construction of this act in question could be adopted than by adopting its plain phraseology. It is in derogation of the common law because it denies the right of this defendant to these three pleas or defenses; but it denies them under such circumstances as the legislature, at any rate, in the exercise of its police power, has not deemed unreasonable. If it is in derogation of

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the common law a strict construction of its letter leads one to conclude that comparative negligence has been left undisturbed, and a fixture upon our damage law of Ohio, when the defendant complies with the Workmen's Compensation act, and when he has not complied with the Workmen's Compensation act, a strict construction of the statute requires that the doctrine of contributory negligence, as known to the common law, should be denied him. How can something which is built upon contributory negligence be preserved to a defendant when that upon which it stands has been eliminated? It seems to me to follow that if the foundation has been removed, that which is built upon it, the superstructure, must fall with it.

It is contended that the act is unconstitutional. While I am not furnished with authorities, or given the benefit of counsel's views more than to suggest the question, I feel constrained to say that in view of the liberal construction given to these modern-day statutes by our courts, and in the light of the apparent intent and purpose of the legislature, as well as the constitution granting very broad police powers to the legislature, the same is not in conflict with any constitutional provision.

The application of the United States Supreme Court's decision of the Railway Employee's act, in the opinion of Mr. Justice Vandeventer, would seem to me to be decisive of the right of the legislature to pass the act in question.

In *Mondou v. Railway*, 223 U. S. 49 [56 L. Ed. 327, 346], is found this language:

"Briefly stated, the departures from the common law made by the portions of the act against which the first objection is leveled are these: (a) the rule that the negligence of one employee resulting in injury to another was not to be attributed to their common employer, is displaced by a rule imposing upon the employer responsibility for such an injury, as was done at common law when the injured person was not an employee; (b) the rule exonerating an employer from liability for injury sustained by an employee through the concurring negligence of the employer and the employee is abrogated in all instances where the employer's violation of a statute enacted for the safety of his employee's contributes to the injury, and in other instances is

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displaced by the rule of comparative negligence, whereby the exoneration is only from a proportional part of the damages corresponding to the amount of negligence attributable to the employee; (c) the rule that an employee was deemed to assume the risk of injury, even if due to the employer's negligence, where the employee voluntarily entered or remained in the service with an actual or presumed knowledge of the conditions out of which the risk arose, is abrogated in all instances where the employer's violation of a statute enacted for the safety of his employees contributed to the injury; and (d) the rule denying a right of action for the death of one person caused by the wrongful act or neglect of another is displaced by a rule vesting such a right of action in the personal representatives of the deceased for the benefit of the designated relatives.

Of the objection to these changes it is enough to observe;

First: "A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself as a rule of conduct, may be changed at the will * * * of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances."

Munn v. Illinois, 94 U. S. 113, 134 [24 L. Ed. 77]; *Martin v. Railway*, 203 U. S. 284 [27 Sup. Ct. Rep. 100; 51 L. Ed. 184]; *Rodd v. Heartt*, 24 U. S. (21 Wall.) 558, 597 [22 L. Ed. 654]; *Western Union Tel. Co. v. Milling Co.* 218 U. S. 406 [31 Sup. Ct. Rep. 59; 54 L. Ed. 1088].

In the light of the two decisions of the common pleas courts of this state in different judicial districts, before referred to, and of the principle announced by the Supreme Court of the United States, construing a statute in derogation of the common law, and after a full consideration of the terms of the two acts under consideration, I am brought to the conclusion that the demurrer to this second defense should be sustained.

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BUILDINGS—CONSTITUTIONAL LAW—PURE FOOD LAWS.

[Hamilton Common Pleas, April 26, 1912.]

JOSEPH BERNHARDT v. EDWARD WISE.*Proscription Against Basement and Cellar Bakeries Held Constitutional.**

The proscription of Gen. Code 1012 against the use of cellars or basements for bakeries is within the reasonable exercise of the police power of the state and, as such, is not rendered unconstitutional by reason of its application to bakeries so located prior to the enactment of this particular statutory provision.

[Syllabus approved by the court.]

HABEAS CORPUS.

Powel Crosley and John C. Rogers, for plaintiff.
John A. Deasy, for defendant.

GORMAN, J.

The plaintiff on February 26, 1912, filed his petition in this court against the defendant, a constable in and for Cincinnati township, Hamilton county, Ohio, alleging that he, the plaintiff, is unlawfully restrained of his liberty by the defendant, and praying that a writ of habeas corpus may issue to said defendant, and that the plaintiff may be discharged from such illegal restraint on final hearing. The petition is in due form, and there is attached thereto a copy of an affidavit and warrant under which the plaintiff was arrested and detained.

The defendant answered setting up that he is a duly elected and qualified constable of Cincinnati township, Hamilton county, Ohio, and that he has the body of the petitioner, Joseph Bernhardt, in his custody by virtue of a warrant issued by one Harry D. Armstrong, a justice of the peace in and for Columbia township, Hamilton county, Ohio. A copy of the warrant is set out given under the hand and seal of the justice of the peace. There is also set out a copy of the affidavit upon which the

*Affirmed, Bernhardt v. Wise, 34 O. C. C. 114.

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warrant for the arrest of the petitioner is based. The defendant constable justifies the arrest and detention under the warrant, which it is admitted is not defective and was duly issued upon the filing of the affidavit. The copy of the affidavit set out in the answer discloses that the arrest was made at the instigation of one Eugence Franck, state inspector of bake shops, for the state of Ohio, and in the affidavit, he charges that the petitioner on or about February 16, 1912, at the county of Hamilton and state of Ohio did then and there use a cellar as a bakery, contrary to the statute in such case made and provided, and against the peace and dignity of the state of Ohio.

The petitioner has replied to the answer of the constable in which he admits that he is detained by virtue of a warrant held by the defendant Wise, as constable, and admits that said warrant was issued by virtue of Gen. Code 1012. The petitioner further avers that he is a baker and engaged in the bakery business at 110 East McMicken avenue in the city of Cincinnati, and that the oven of said bakery used by him is in the basement of said premises and that said basement or cellar has been devoted to the use of his bakery since 1890, long prior to the passage of Gen. Code 1012. He further avers that his said bakery is and always has been constructed and operated upon and under all proper and sanitary rules, regulations and orders of the proper authorities of the city of Cincinnati and the state of Ohio, and that the reports of the board of health of the city of Cincinnati show that the petitioner's cellar bakery is of the highest class, established by said board, namely, AA, and that he has a vested property interest in his bakery plant so located in said basement or cellar; that the same cost him a very large sum of money to construct and equip, and that it would cost him a large sum of money to be compelled to abandon said bakery and to construct another above the street level, and that he would by abandoning said bakery and removing from said premises suffer a large loss of trade and good will of his business, which he has built up at his present place of business at a large expense of time and money; that he resides with his family on said premises above said bakery, and if compelled to remove his bakery would also be compelled to remove his residence. He further avers

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that the bakery goods baked in said cellar bakery are as healthful as if such goods were baked in an oven located above the street level. The petitioner further avers that in the baking of his bakery goods he applies a heat of from 350 to 450 degrees Fahrenheit, thereby destroying all bacteria and other impurities in any manner likely to affect the bakery goods produced by the petitioner; that he has complied with all the rules, regulations and requirements of the state and of Cincinnati, keeping clean the floors, sidewalks, ceilings, woodwork, pans, cupboards, and all utensils and machinery used in said bakery; that he keeps the same well lighted and ventilated with adequate plumbing, and in every other respect complies with all the requirements of the state law and the city ordinance with reference to sanitation in his said bakery. He further avers that the healthfulness of his bakery goods does not depend upon the location of the said bakery, but depends upon the application and rigid enforcement of stringent rules and regulations as to plumbing, ventilation, cleanliness of all oven utensils, rooms, receptacles, machinery and employes used or employed in or about the production of bakery goods, whether so employed above or below the street level.

Plaintiff further avers that there are over one hundred so-called cellar bake shops in the city of Cincinnati which cost the owners large sums of money, aggregating a hundred thousand dollars, and which have been in use for many years and prior to the passage of Gen. Code 1012 in its present form. The petitioner further avers that there are many rathskellers, restaurants, hotels, boarding-house kitchens and other places in which baking and cooking are done, and eatables and drinkables prepared for public consumption, in the city of Cincinnati, located in part or wholly below the street level, and that no statute has been passed by the general assembly of Ohio prohibiting such places from being used for such purposes, and that Gen. Code 1012 discriminates against bakeries alone, and for that reason is unconstitutional and void, as not being a law having a uniform operation throughout the state. The complainant further avers that said Gen. Code 1012 has no application to his bakery, because he had a vested right therein at the

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time said Gen. Code 1012 was passed and became a law of this state. He further avers that said section is unconstitutional and void as being in contravention with Art. I, Sec. 1 of the bill of rights of the Ohio constitution, and contrary to the provisions of Sec. 1 of the fourteenth amendment of the constitution of the United States.

A demurrer was filed to this reply and the cause was submitted to the court upon the arguments of counsel and voluminous briefs.

There are two questions raised by the demurrer to the reply, which demurrer, of course, searches the record, and under it the court may examine the petition, the answer and the reply, to determine whether or not the petitioner is illegally restrained of his liberty.

The petitioner claims, first, that Gen. Code 1012 does not apply to his bakery, because at the time of the passage of the act referred to, or rather the act of which Gen. Code 1012 is a part, it was not intended to apply to cellar or basement bakeries then in existence. Secondly, he claims that if the court should be of the opinion that this law does apply to his bakery, then the law, or a part thereof, is unconstitutional and void on the grounds: first, that the law is not uniform in its application and operation; and, secondly, on the ground that the prohibition of the use of his cellar or basement for a bakery is a taking of his property without due process of law, contrary to the provisions of Sec. 1 of the fourteenth amendment of the constitution of the United States. We shall examine these questions in the order in which they have been stated.

The legislature of Ohio on April 27, 1896, passed a law known as an act for the regulation of the manufacture of flour and mill food products. The act contained ten sections. On April 21, 1898, the legislature amended this act and repealed all the sections of the prior enactment. We need concern ourselves only with the amended act. In substance the amended act provides in nine sections, for the proper sanitation, drainage, plumbing and all general sanitary conditions for bakeries, requiring air shafts, windows, ventilating pipes, etc., such as may be required by the chief or district inspector of bake shops. The

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act further provides for proper washrooms, closets, toilet rooms, etc., prescribes the height of the room, how sides of the walls should be constructed, the ceilings and the floors, kinds of furniture to be used, and many other regulations which need not here be set out. The act further provided as follows:

“And no cellar or basement not now used as a bakery, shall be hereafter used and occupied as a bakery, and a cellar heretofore occupied shall, when once closed, not be reopened, unless the proprietor shall have previously complied with the provisions of this act.”

This law was carried into and numbered Rev. Stat. 4364-71 to 4364-79, inclusive. No change was made in this law until the codifying commission was appointed by virtue of an act of the legislature passed April 2, 1906 (98 O. L. 221). This commission, composed of three persons appointed by the governor, was directed and required to bring together all the statutes and parts of statutes passed by the legislature relating to the same matters, and to generally omit all redundant and obsolete enactments such as have no influence on existing rights or remedies, making alterations in harmonious statutes, to omit ambiguous words, and to arrange the statutes under suitable titles, divisions, subdivisions, chapters and sections, and to present the same in a general, concise and comprehensive form consistent with the clear expression of the will of the general assembly, rejecting all equivocally ambiguous, circuitous and tautological phraseology. The commission having performed its work, submitted to the general assembly what is known as the General Code, and this General Code was passed and adopted by the legislature of the state as its own handiwork, February 14, 1910; so that the General Code as it now stands is an enactment of the general assembly of the state of Ohio, in its sovereign capacity as the law-making body of this state. There can be no occasion for a reference to the work of the codifying commission in view of what the legislature subsequently did in adopting this code as one enactment of the legislature except for the purpose of shedding light upon the meaning to be given to Gen. Code 1012.

Now Gen. Code 1012 is a part of the enactment of the legislature passed April 21, 1898. That enactment relating to

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bakeries is now found compiled within the limits of Sections 1012 to 1019 inclusive, of the General Code. Section 1019 provides that a violation of any of the provisions of this code relating to bakeries, or a refusal to comply with a requirement of the chief inspector of workshops and factories or a district inspector made as provided herein shall subject the offender to pay for the first offense not less than twenty dollars nor more than fifty dollars, and not less than fifty dollars nor more than two hundred dollars, or imprisoned not more than ten days, for each succeeding offense.

The section of this code which the petitioner is charged with having violated is 1012, which reads as follows:

"All bakeries shall be drained and plumbed in a sanitary manner and provided with such air-shafts, windows or ventilating pipes, as the chief inspector of workshops and factories or a district inspector directs. No cellar or basement shall be used as a bakery."

It is this last sentence of this section of the General Code which the petitioner is charged with having violated, and it is this part of the section which it is contended does not apply to the petitioner's bakery, and if so, then the prohibition contained in this language is an unconstitutional enactment. It is argued and contended by counsel for the petitioner that by taking the enactment of April 21, 1898, it will be seen that the legislature provided that no cellar or basement not then used as a bakery should be thereafter used or occupied as a bakery, and that it was not the intention of the legislature, nor did it so enact, that a cellar or basement which was then used as a bakery should not continue to be used as a bakery. In other words, it is contended that the act of 1898 was prospective in its operation and intended only to apply to those cellar or basement bakeries which might be opened after the passage of the law, and that inasmuch as the codifying commission was only authorized to bring together all the statutes, simplify the same and reject all unnecessary language, the commission when it wrote Section 1012, or the last sentence thereto, simply stated in substance what the legislature had provided by the act of April 21, 1898, and that the legislature when it adopted the work of the Code

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Commission as its own did no more than re-enact that part of the law of 1898 which applied to cellar and basement bakeries.

Now, let us analyze the language of the legislature in the act of 1898 and see what the legislature did. It is true, I think, and can not be controverted, that the act intended to apply to the bakery business as it should be conducted after the passage of the act of 1898. It was purely and simply a regulation of the bakery business and so intended. It had no retrospective operation or effect, but merely prospective. The legislature divided cellars and basements into two classes by this act of 1898. One class was cellars and basements then used as bakeries, that is, used as such at the date of the passage of the act of April 21, 1898; and the other class, cellars and basements not used as bakeries at that time. Now the legislature provided that cellars and basements not then used as bakeries could not be thereafter used as such; but did not prohibit cellars and bakeries then used as bakeries from being so used thereafter. But the legislature further provided in this act that when a cellar or basement bakery was discontinued or closed, it could not be reopened, unless the proprietor shall have previously complied with the provisions of the act, which could only mean, complied with the provision of the acts with reference to alterations and changes and with respect to ventilation and sanitation.

Now, the codifying commission and the legislature, by the language of Gen. Code 1012, have substituted for all this language the prohibition, "no cellar or basement shall be used as a bakery." If this language in Gen. Code 1012 has the same force and effect as the language in the act of 1898, then the complainant's contention is well founded, that the law does not apply to his bakery, because it is admitted that his bakery in his cellar was in existence and operation at the time of the passage of the act of 1898, and also at the time of the adoption of the Gen. Code in February, 1910.

It seems to the court that the language of Gen. Code 1012, which prohibits cellar and basement bakeries, is not the same as the language used in the act of 1898, nor can it be construed to mean the same thing. By the language of the last sentence

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of Gen. Code 1012 there is no classification of or exception to cellars and basements. No cellar or basement can be used as a bakery under this language whether it was theretofore used as a bakery or not, whereas by the language of the act of 1898 the prohibition extended only to cellars and basements which were not then used as bakeries, and cellars and basements which were then used as bakeries could continue to be so used.

There has been an elimination of the classification of cellars and basements which is found in the act of 1898. If the language of Gen. Code 1012 were employed in the act of 1898, then no bakery could be carried on in any cellar or basement, whether the business was then in existence or not.

As the court understands this act, it was not an act to regulate property, but an act to regulate business, to wit: the business of baking food stuff for the people; and it was undertaken to prescribe that the business should not be carried on in certain places, which no doubt the legislature contemplated were not suitable for the conduct of such business. Cellars and basements are not as open to the sunshine and the air, and are more subject to dampness and mouldiness, and I think it will be generally admitted that food stuffs, especially bread stuffs, can not be as well kept in cellars, as above ground; nor can the materials out of which bread stuffs are made retain their purity as well in cellars and basements as above ground.

Now, I am clearly of the opinion that the codifying commission and the legislature, by changing the language of the act of 1898, has made the prohibition apply not only to bakeries that were conducted and carried on in cellars and basements at the time the act of 1898 was passed, but it has made the prohibition extend to the carrying on of the bakery business in any cellar or basement regardless of the time when the business was established, whether prior to the adoption of the General Code in 1910, or thereafter. It is analogous to the situation which is presented by a person who is engaged in the business of trafficking in intoxicating liquors.

One may be engaged in that business of retailing intoxicating liquors on his own premises, without violating any law of the state, but under the local option law the people of the dis-

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trict in which his saloon is situated, may by a majority vote determine that he shall not carry on that business in that place, and upon an election being held as provided by law, if the majority of the electors in the district in which the saloon is located so express themselves the person or persons engaged in the saloon business must discontinue the business, and they are prohibited from opening up or carrying on the business thereafter. The Supreme Court has decided that such an enactment is, a valid exercise of the police power by the legislature, and that such legislation is in the interest of good morals of the state. The legislature may also provide, under the police power, that dynamite and gunpowder shall not be stored in localities where any danger is likely to result therefrom to persons and property. The legislature may also provide that slaughter-houses and other establishments where the business carried on has a tendency to endanger the health, or annoy, or become offensive to the sense of smell of the inhabitants of portions of the community shall not be carried on in those places. And no doubt the legislature when it passed this act, and the codifying commission and the legislature when it re-enacted the Gen. Code, had in mind the purpose or intention of passing laws in the interest of the public health.

Now the question arises, whether or not this enactment, which the court construes to be a prohibition to the carrying on of the bakery business in any cellar or basement, is a valid and constitutional exercise of the police power vested in the legislature, or whether or not it is a violation of the guarantee extended to all the citizens by Sec. 1 of the fourteenth amendment of the constitution of the United States. That section, or the part thereof with which we are concerned, reads as follows:

“Nor shall any state deprive any person of life, liberty or property without due process of law.”

It is contended that the bakery business is a lawful and harmless business, and that no evil arises out of the business; that it is not a nuisance and can not be declared to be a nuisance, and that the extent to which the legislature may act under the exercise of the police power is to provide proper sanitary regulations for the conduct of the business and that it can not

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prohibit the carrying on of the business in any place or locality. If this be true, then the last portion of Gen. Code 1012 must be held to be unconstitutional as in violation of the guaranteed right of the petitioner under this article of the constitution of the United States. Now we shall proceed to examine this question.

I am of the opinion that Art. I, Sec. 1 of the bill of rights of the Ohio constitution, which provides that all men have certain inalienable rights, among which are those of enjoying and defending life, liberty, acquiring and possessing and protecting property, is not contravened by this section of the statute. Nor is Art. I, Sec. 19 of the bill of rights of the constitution of Ohio, violated by this act. That section among other things provides that "private property shall ever be held inviolate and shall not be taken without compensation made to the owner in money."

This legislation, in the opinion of the court, falls within the class of legislation which may be enacted under the police power of the state, and the only question as to its constitutionality is whether or not it is violative of the fourteenth amendment of the constitution of the United States, which among other things prohibits any state from depriving any person of life, liberty or property without due process of law. To the extent that the petitioner's property in this case is limited in the uses to which it may be applied, there is to that certain extent a deprivation of property.

When the use of a property is prohibited, it is the equivalent of the taking of the property; and if this use is prohibited without due process of law, then, in the opinion of the court, there has been a taking of private property without due process of law. But in the exercise of the police power by the state, which by the way is a power that is not affected by the fourteenth amendment of the federal constitution, persons and property, liberty of movement and freedom of action, are subject to a limited control; and a limitation may be put upon the use of property and the use of one's liberty. This it has been held by all the authorities may be done, provided the limitation upon the liberty of the citizen or upon the use of his prop-

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erty is not an unreasonable one and tends to promote the general welfare, the public health, comfort, and protect the lives and security of the people.

The sole question to be determined in this case is whether or not the last sentence in Gen. Code 1012 which prohibits the use of bakeries in cellars and basements, is a reasonable exercise of the police power of the state. While the fourteenth amendment guarantees due process of law and equal protection of the laws, and is capable of an interpretation subjecting state legislation to a federal control nearly equal in scope to that now exercised by the state courts, nevertheless the view expressed by the Supreme Court of the United States in the "Slaughter-House Cases," 83 U. S. (16 Wall.) 36 [21 L. Ed. 394], that the chief application of this clause can be found in the protection of the negro, was for many years considered to be the true interpretation of this amendment. But in later years the rule therein laid down has been widely departed from, and it is now held by the Supreme Court of the United States that this amendment may be invoked for the purpose of protecting the liberty and property of the individual citizen who claims that he has been deprived thereof without due process of law. It is not an easy matter to define what is meant by due process of law. In Great Britain it simply means that it is a judgment in accordance with the forms, practices and precedents of the courts of Great Britain; or it means an act of parliament. No court can question the validity of an act of parliament. But in this country and in all the states thereof, by reason of the fact that we have a written constitution adopted by the people of the United States and of the different states, the courts have taken to themselves, if it has not been conferred upon them, the power and authority to determine the validity of any act of the legislative department of the government. Therefore, in determining whether or not property has been taken without due process of law in this country and in this state, reference must be made to the constitutional provisions affording protection to property and prohibiting the taking thereof in any other manner than that prescribed by the fundamental law of the land.

According to the broad and equitable doctrine of modern

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cases, it is not necessary to constitute a taking of property for public purposes that the actual occupancy or possession of the property should be assumed and its title acquired. A serious interruption to the common and necessary use of property is said to be equivalent to taking it, within the meaning of the constitutional provision and it is not necessary that the land should be absolutely taken. See *Pumpelly v. Canal Co.* 80 U. S. (13 Wall.) 166 [20 L. Ed. 557].

The term "police power" has never been clearly circumscribed. Blackstone defines it as "the due regulation and domestic order of the kingdom, whereby the individuals of the state, like members of a well governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood and good manners; and to be decent, industrious and inoffensive in their respective stations." 4 Blackstone, 162-175.

In the decisions of the courts of the various states and the Supreme Court of the United States, we find the term "police power" coupled with internal commerce and domestic trade, health and safety measures, legislation relating to gambling, game laws, idleness, disorderly houses, proper mode of living, the conservation of health, the honor and cleanliness of the people and a multitude of subjects over which it is admitted that the state has ample authority under this power to exercise its paternal care. It is also universally conceded that it is a power to be exercised by the states and not by the federal government; and the only grounds on which the federal courts undertake to pass upon legislation of the character of police regulations, is when the claim is made that the legislation is violative of the fourteenth amendment.

The legislation of which Gen. Code 1012 is a part is an exercise of the power of the state to provide for the health of the people and the conservation of the strength and health of the persons employed in bakeries. The act under consideration was copied almost verbatim from an act passed by the legislature of the state of New York, which was considered in part in the case of *Lochner v. New York*, 198 U. S. 45 [25 Sup. Ct. Rep.

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539; 49 L. Ed. 937]. This act of the legislature of New York undertook to regulate bakeries, to prescribe the number of hours of labor which bakers could be required to perform in any one day, provide for the sanitary conditions of all bakeries and for inspection thereof, for wash-rooms, and limiting hours of labor to sixty a week and not more than ten hours a day. The act also provided that no cellar or basement not used as a bakery at the time of the passage of the act should thereafter be used or occupied as such, unless the proprietor shall comply with the sanitary provisions of the act. An examination of the various sections of this act, which will be found set out in full in the case just cited, will disclose a great similarity to Gen. Code 1012 to 1019 inclusive.

The case above cited arose in Oneida county, New York, where one Lochner was indicted and convicted in the Supreme Court in that county of having required a baker to work more than sixty hours per week in his (Lochner's) bakery. A demurrer was interposed to the indictment on the ground that the law was invalid and void because in contravention of the fourteenth amendment of the federal constitution. It may be interesting to show the diversity of opinion of the judges who passed upon this legislation. The constitutionality of the law was upheld by the judge of the Supreme Court of Oneida county. On appeal to the appellate division of the Supreme Court of New York the constitutionality of the law was sustained by a divided court of three to two. In the court of appeals of New York, composed of seven judges, the judgment of the appellate division of the Supreme Court was affirmed by a divided court of four to three, and on error to the Supreme Court of the United States the judgment of the court of appeals of New York was reversed and the law held to be unconstitutional by a divided court of five to four; Justices Harlan, White, Holmes and Day concurred in a dissenting opinion, whereas five of the judges, Peckham, Fuller, Brewer, Brown and McKenna, held that a part of the law was invalid as an invasion of the constitutional right, of the accused, Lochner, to contract. The constitutionality of this part of the enactment was sustained by twelve judges who passed upon it, and it was held to be uncon-

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stitutional by ten judges; but inasmuch as the Supreme Court of the United States had the last say, and five of the judges held the law to be unconstitutional as against four who held it to be constitutional, that provision of the law which prohibited persons from laboring in bakeries more than sixty hours per week was held to be invalid. The remaining parts of the statute were not affected by this decision.

Without undertaking to question the wisdom of the holding of those judges who held the law to be unconstitutional, it would appear that there was grave doubt as to the unconstitutionality of the legislation, to say the least. As was said by Justice Holmes in his dissenting opinion:

“A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable, would uphold it as a first installment of a general regulation of the hours of work.”

It is an elementary principle of law that courts must not hold any legislation unconstitutional unless it be clearly so, and that every reasonable intendment shall be given to favor the validity and constitutionality of an act of the legislature. If there be any reasonable doubt as to the constitutionality of an act of the legislature, it is the duty of the court to resolve that doubt in favor of the validity of the law and not against it; and the duty to so hold and apply this rule rests with special force upon the judges of the inferior courts, courts below the court of last resort. In this case before the court, if there is any reasonable doubt as to the constitutionality of this legislation, it would be my duty to sustain it.

The strongest case that has been cited by counsel for the petitioner in support of their contention that this law is unconstitutional is *Jacobs, In re*, 98 N. Y. 98 [50 Am. Rep. 636]. The court of appeals of New York in that case had under consideration an act which prohibited and made criminal the manufacturing of cigars in tenement houses, and it was sought to uphold the legislation as a valid exercise of the police power of the state for the conservation of the health of the occupiers of tenement houses. It was attacked upon the same ground that

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the bakery act under consideration in this case is attacked, to-wit, that it was a violation of the constitutional guarantee afforded by the fourteenth amendment of the federal constitution, in that it deprived the occupiers of tenement houses of their property without due process of law. In that case the court held that property may be destroyed or its value annihilated, if the owner is kept from using it for a useful and lawful purpose. It further held that the value of property consists in the right to use the property, and that the constitutional guarantee would be of little worth if the legislature could, without compensation, deprive property owners of the right to use the same for any lawful purpose. In that case numerous authorities were cited supporting the doctrine that the legislature, in the exercise of the police power, has the right to limit in a reasonable manner the uses to which property may be put, if the limitations of those uses tend in any way to further the purpose for which the legislation was intended. But in that case, the Supreme Court was of the opinion that there was nothing deleterious or unwholesome in or about the manufacture of cigars in tenement houses, and that the prohibition of the manufacture of cigars therein did not tend in any manner to protect the health of occupants of tenement houses.

Cooley, Consti. Lim. (4 ed.) Sec. 719, lays down this rule:

“The limit to the exercise of the ‘police power’ in these cases must be this: the regulations must have reference to the comfort, safety or welfare of society; they must not be in conflict with any of the provisions of the charter; and they must not under pretense of regulation, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations in fact, and not amendments of the charter in curtailment of the corporate franchise.”

Generally, it has been held that it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public safety, and if its measures are calculated, intended, convenient and appropriate to accomplish this end, the exercise of its discretion is not subject to review by the courts; but they must have some relation to those ends. Under the mere guise of police regulations, personal

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rights and private property can not be arbitrarily affected, and the determination of the legislature is not final or conclusive.

If we are to determine the validity of this act of the legislature under consideration, Gen. Code 1012, by this rule, we must ask ourselves whether or not the legislation has any relation to the end sought to be accomplished by the legislature. Now, it is manifest that the purpose intended to be accomplished by the legislature or the end sought to be attained, was the preservation of the health of the inhabitants of this state. All people of the state use bread, and it can not be denied that it is desirable and essential that the bread used by the people should be as wholesome as it is possible to make it. Wholesome bread conduces to good health, and unwholesome bread very materially conduces to ill-health. Furthermore, it was no doubt in the mind of the legislature to conserve the health and strength of employes in bakeries.

Now can it be said that the prohibition of bakeries in cellars and in basements has no relation towards securing the health of the people of the state and the health and strength of the employes in bakeries? It must be known to any court who undertakes to pass upon legislation of this character, that cellars and basements are not as sanitary because of their location as are rooms and apartments entirely above the ground; nor can they be made as wholesome as rooms and apartments entirely above ground. There is always more or less dampness in rooms under ground or partly under ground; there is always a limitation to the amount of light that may be admitted to such rooms; there is a limitation to the amount of wholesome air that may be admitted; and there is a limitation to the amount of sunshine that may be secured in such places.

The court is of the opinion that it cannot be said in this case that the prohibition of bakeries in cellars and basements has no relation whatsoever to the health of the inhabitants and the strength and health of the employes in bakeries. If this legislation has any relation to the end sought to be attained by the legislature, then the legislature is the sole judge of whether or not that end will be attained. It may be that, in the opinion of this court, neither the health of the inhabitants nor of those

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employed in the bakeries will be furthered or promoted by prohibiting bakeries in cellars or basements, but if every judge upon every bench in the state of Ohio were of that opinion, and nevertheless reasonable men might be found who hold to the contrary opinion, it would not be within the province of this court to hold the law unconstitutional on the ground that it is an unreasonable exercise of the police power. If reasonable men might differ as to the efficacy of the law, then the law must be held to be constitutional, because the legislature is presumed to be composed of reasonable men, and if in their opinion it will tend to bring about the ends which they seek to attain, it is not for the court to set up its judgment and opinion as to the efficacy of the law against the judgment and the opinion of the legislative body. Even as a police regulation for the conservation of the health and strength of those who labor in bakeries, I am of the opinion that a court in the exercise of a sound judgment would not be warranted in saying that the legislature has no right or power to prohibit the carrying on of bakeries in cellars and basements. The court is inclined to agree with the judgment of Justice Holmes, in *Lochner v. New York*, *supra*, that "this case is one that may be decided from an economic standpoint." He says that "if it were a question whether I agreed with the economic theory, which a large part of the country does not entertain, I should desire to study it further and long before making up my mind."

Again he says:

"It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract."

He cites the Sunday laws, usury laws, laws prohibiting lotteries, the post office laws and regulations, and finally concludes that if reasonable men might think any legislation a proper measure to secure the health, comfort or general welfare of the community, then it is not within the province of the court to hold the law unconstitutional.

A case decided by the Supreme Court of Wisconsin,

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February 22, 1910, *Benz v. Kremer*, 142 Wis. 1 [125 N. W. Rep. 99; 26 L. R. A. (N. S.) 842], passes upon the constitutionality of an act similar to the one under consideration. It prohibited bakeries in a room, the floor of which was more than five feet below the level of the surface of the adjacent ground. An injunction was sought by one Makielski, the owner of the property, and one Bentz, the tenant of the property using the same as a bakery in the city of Milwaukee, against the defendant, Kremer, as state bakery inspector, to enjoin him from requiring them to discontinue the use of their premises as a bakery, the same being conducted in a cellar more than five feet below the adjacent ground. The court dismissed the injunction and held the law to be a valid exercise of the police power by the legislature. It was further contended in this case that the plaintiff's bakery was constructed after the passage of the law requiring the floor to be not more than five feet below the level of the street. The court, in passing upon the law, speaks of bakeries as follows:

"That places where bread stuff for public consumption is prepared should be sanitary would not be questioned, nor that such places where sun and air are admitted would be much more so than in basements so far below the surface of the ground as to practically, or in a large degree, exclude sunlight and an abundance of pure air, and thereby render the bakery less sanitary than if constructed not more than five feet below the level of the street. * * * It is a matter that must be left to the judgment of the legislature."

The court further says:

"Obviously, such a regulation could not be held unreasonable when its purpose and the effect of its observance would be to promote the production of wholesome food."

This language is especially pertinent to the claim of the plaintiff in this case, that his bakery is A 1, and one of the most sanitary bakeries in the city of Cincinnati. This same claim was made in the Wisconsin case, and note the language of the Supreme Court with reference to this claim:

"But it is said that the plaintiff's bakery, though more than five feet below the surface of the ground, is still as sanitary as

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any other, because of the physical condition of the location, hence that there is no necessity for enforcing the law in the instant case. But individual cases can not determine the necessity of a general law on the subject, nor indeed rule the question of classification. The question is whether in general the public health will be promoted by the rule, and not whether isolated cases do not need such a rule. If the rule be in the interest of the public health it must be general and all within the class controlled by it."

And in the case at bar, although it be admitted by the demurrer that the plaintiff's bakery is sanitary, nevertheless the constitutionality of the law and the right of the plaintiff to maintain his bakery under ground can not be determined by the fact that his bakery is the most sanitary one in the city of Cincinnati.

Numerous authorities might be cited to sustain the proposition that it is the function of the legislature to determine what reasonable measures shall be passed in the interest of the public health and the general welfare, and that courts must not and can not hold a law passed under the police power to be unconstitutional, unless it is manifestly so and does not tend to accomplish the purposes intended by the legislature.

In deciding an injunction suit brought by the plaintiff in this case some time ago, this court in an *obiter* expressed a doubt as to the constitutionality of this law, but stated that no proper consideration of the constitutionality of the law had been given. Since this case has been submitted, the court has read numerous authorities and has considered the question of the constitutionality of the law as fully as the limited time would permit, and has come to the conclusion that in view of his position as a judge of a court inferior to that of the Supreme Court of the state, and in view of the fact, to say the least, that reasonable minds might differ as to the efficacy of this legislation to produce the results intended by the legislature, it is not meet or proper for this court to hold this law unconstitutional.

One of the very recent cases decided by the Supreme Court of the United States is that of *Laurel Hill Cemetery v. San Francisco*, 216 U. S. 358 [30 Sup. Ct. Rep. 301; 54 L. Ed. 515].

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In that case the legislature of California authorized the city of San Francisco to pass an ordinance prohibiting burial of bodies in cemeteries located within the city limits. It was contended that there was nothing unsanitary in the burial of persons within the city limits. The ordinance recited that the burial of the dead within the city and county of San Francisco is dangerous to life and detrimental to the public health. In deciding the case Justice Holmes, who delivered the opinion, says on page 365:

"If every member of this bench clearly agreed that burying grounds were centers of safety, and thought the board of supervisors and the Supreme Court of California wholly wrong, it would not dispose of the case. There are other things to be considered. Opinion still may be divided, and if, on the hypothesis that the danger is real, the ordinance would be valid, we should not overthrow it merely because of our adherence to the other belief. Similar arguments were pressed upon this court with regard to vaccination, but they did not prevail. On the contrary, evidence that vaccination was deleterious was held properly to have been excluded." *Jacobson v. Massachusetts*, 197 U. S. 11 [25 Sup. Ct. Rep. 358; 49 L. Ed. 643].

On page 366, in speaking of the authority of the legislature to limit the uses of property under the police power, he says:

"And yet again, the extent to which legislation may modify and restrict the uses of property consistently with the constitution is not a question for pure abstract theory alone. Tradition and the habits of the community count for more than logic. Since, as before the making of constitutions, regulation of burial and prohibition of it in certain spots, especially in crowded cities, have been familiar to the Western world. This is shown sufficiently by the cases cited by the court below. * * * The plaintiff must wait until there is a change of practice or at least an established consensus of civilized opinion before it can expect this court to overthrow the rules that the lawmakers and the court of his own state uphold."

The Supreme Court of our own state in the case of *State v. Board of Ed.* 76 Ohio St. 297 [81 N. E. Rep. 568; 10 Ann. Cas. 879], has upheld the regulations and rules of a board of

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education made under R. S. 3986 (Gen. Code 7686), authorizing them to make and enforce rules and regulations to secure vaccination, which rules prohibited any child from attending school who had not been vaccinated, and the question of whether or not vaccination was a means of preventing smallpox the court said was one for the legislature to determine and not for the court.

So, in the case at bar, the court is of the opinion that it is for the legislature to say whether or not the general health of the people of this state will be promoted and the health and strength of employes in bakeries will be conserved by prohibiting bakeries in cellars and basements. The farthest that this court could go would be to express a doubt as to the constitutionality of this legislation. If it be only a doubt, then the doubt must be resolved in favor of the validity of the law, in view of the rule heretofore referred to as applicable to courts in the determination of the constitutionality of legislation.

The limits within which opinions should be stated will not permit the court to comment upon the numerous authorities cited in the very able briefs of counsel for the petitioner and the respondent in this case. Suffice it to say that whatever casual opinion the court may have expressed upon the hearing of the injunction suit, he is now satisfied that this legislation is not in contravention of any provision of the constitution of the state of Ohio, or of the fourteenth amendment of the federal constitution.

The judgment of the court is, therefore, that the petitioner be remanded to the constable to be dealt with as provided by law.

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DISORDERLY CONDUCT—INTOXICATING LIQUORS.

[Hamilton Common Pleas,———1913.]

JAMES HUGHES v. CINCINNATI (CITY).

Intoxication or Drunkenness Without Disorderly Conduct not Municipal Offense.

Intoxication or drunkenness, except as the good order and quiet of a municipality are disturbed by it, does not constitute an offense under Gen. Code 3664 for which punishment may be prescribed by ordinance; hence a police court conviction therefor will be reversed.

[Syllabus approved by the court.]

ERROR to Cincinnati police court.

Darby & Benedict, for plaintiff.

Alfred Bettman, city solicitor, for defendant.

BROMWELL, J.

This case comes into this court on error to the police court of the city of Cincinnati.

The plaintiff in error asks to have the judgment of that court reversed and that he be discharged from custody on the ground hereinafter set out.

The petition in error shows that he was arrested, tried, found guilty and sentenced upon a charge of "appearing in public in a state of intoxication and drunkenness," as set out in the affidavit of the arresting officer.

The recognizance was for the appearance of the plaintiff in error on a charge of "drunkenness."

The entry of continuance defines the charge as "drunkenness."

The transcript of the proceedings on the appearance in the police court shows the same charge and that the plaintiff in error was found guilty as charged in the affidavit and warrant.

The section of the city ordinance under which these proceedings were had is No. 881, which, so far as it applies to this case, reads as follows:

Section 881. " * * * It shall be unlawful for any

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person to appear in public in a state of intoxication or drunkenness."

The plaintiff in error preserved his rights by motions to dismiss and quash the information and by demurrer thereto.

The grounds relied upon for reversing the judgment of the lower court were:

1. That the said court was without jurisdiction to hear and consider said affidavit and charge.

2. That the facts stated in said affidavit and charge are not sufficient to constitute an offense against the city of Cincinnati.

3. That the ordinance upon which said charge and affidavit are based is illegal, void and without the jurisdiction of council to pass.

4. That the court erred in the overruling of the motions for a new trial and in arrest of judgment.

5. Other reasons apparent upon the face of the record.

The same question has been presented in two different cases in this state, the first being that of *Jefferies v. Defiance*, 11 Dec. Re. 144 (25 Bull. 68); and the other *Fitzsimmons, In re*, 57 Bull. 285 (13 N. P. N. S. 104).

The municipal code (Gen. Code 3664) provides that,

"The council of a city or village shall have power to provide for the punishment of persons disturbing the good order and quiet of the corporation * * * by intoxication, drunkenness," etc.

Note that this section does not authorize council to pass an ordinance making intoxication or drunkenness an offense. What it does authorize is an ordinance providing for the punishment of persons disturbing the good order and quiet of the corporation by any of the means set out, among which are "intoxication, and drunkenness."

In the *Jefferies* case above referred to the court said:

"Under Sec. 2108 Rev. Stat. of Ohio, it is not the simple act of being intoxicated that may be provided against by an ordinance, but it is only when such intoxication results in a disturbance of the good order and quiet of the corporation."

In the *Fitzsimmons* case the identical question on the same

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ordinance as we are now considering was passed upon by Judge Warner, of our insolvency court, in a *habeas corpus* proceeding, and he declared the ordinance invalid and discharged the prisoner.

As counsel for plaintiff in error aptly says in his brief, "It goes without saying that council cannot assume to itself, nor exercise, powers not specifically granted; nor can it legislate upon a subject without legislative authority, nor exceed the legislative grant.

I am of opinion that as the ordinance in question is unauthorized in its present form, the police court had no jurisdiction to try the plaintiff in error and that its judgment and sentence should be reversed and the plaintiff in error discharged.

CORPORATIONS—COURTS—LIMITATIONS—PLEADING.

[Franklin Common Pleas, March, 1913.]

H. A. GLASS ET AL. v. W. S. COURTRIGHT ET AL.

1. Stockholders of National Bank May Bring Action Against Directors for Mismanagement Without Demand Upon Receiver.

Stockholders of an insolvent national bank, which is in the hands of a receiver, appointed by the comptroller of currency, to wind up its affairs and pay its debts, having questioned the receiver's qualification to bring and maintain the suit and without having made demand upon him, may properly bring an action in their own names against its directors personally for mismanagement of the affairs of the bank.

2. Forfeiture of National Bank Franchise not Prerequisite to Stockholders' Recovery of Damages for Knowingly Violating Banking Statute.

Forfeiture of the franchise of a national bank is not a prerequisite to the enforcement of the personal liability of directors prescribed by Sec. 5239 U. S. Rev. Stat. for knowingly violating the banking statute, especially since Sec. 5234 U. S. Rev. Stat. authorizes a receiver appointed by the comptroller of currency to enforce the individual liability of stockholders to pay debts. Hence, an action for damages, resulting from known violations of the federal banking act by directors of national banks, may be brought by stockholders in their own names under Sec. 5239 U. S. Rev. Stat.

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3. State Courts may Determine Common Law and Statutory Liability of National Bank Directors.

State courts in stockholders' suits may determine the liability of directors of a national bank both at common law and under the national banking act, the statutory duty, however, being determinable under the statute in so far as the particular acts fall within its provisions.

4. Receiver of National Bank Cannot Collect Damages for Statutory Liability for Benefit of Stockholders.

Neither Sec. 5239 U. S. Rev. Stat. nor Sec. 5234 authorizes a receiver to collect damages for the statutory liability created for the benefit of stockholders of a national bank, the receiver's rights are to be exercised only when necessary to pay debts of the bank.

5. Stockholders of National Bank Proper Parties in Cause Based on Misconduct of Comptroller Appointing Receiver.

A receiver of a national bank represents the office of comptroller of currency who appoints him, hence allegations, in an action against its directors for mismanagement, respecting the participation of the comptroller in the acts of the bank, being of such nature as to press themselves upon the consideration of the court of equity charged with the duty of conserving the rights of stockholders, set forth reasons for recognizing the stockholders as parties, rather than the receiver, to bring the action.

6. Variant Liabilities Determined in Principal Action in Equity.

An action for misfeasance in the management of a national bank, brought by stockholders against its directors, some of whom were directors when the wrongful acts were committed and some of whom were elected subsequently thereto, requires adjustment of variant liability, constituting the cause one in equity in which the court may apportion liability according to the loss of capital resulting from their acts, but does not amount to a separate cause of action.

7. Dividends Illegally Paid by Directors Deducted From Losses Recovered by Stockholders.

Payments of illegal dividends by directors of a national bank to its stockholders will be deducted from their losses upon determination by a court of equity of the losses sustained by stockholders growing out of mismanagement by such directors, and may be adjudicated in the principal action.

8. Cause of Action Stated not Affected by Matters Alleged Growing out of or Subsequent to Primary Cause.

An action against directors personally for mismanagement of the affairs of a national bank, charging them with purchasing worthless or doubtful notes and bills from another bank taken by it for money loaned, accepting a promissory note executed by the latter bank, assuming its debts which were greater than its assets and making the former bank insolvent at its inception, is based on the common law obligations of such directors. The fact that other and subsequent transactions

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by such directors directly or indirectly impaired the financial condition of the bank does change the nature or character of the action; nor does the fact that some of the directors were subsequently elected, causing a variant liability, effect an increase of causes of action, but are mere links to constitute the cause one in equity.

9. Allegations not Definite in Stating Cause at Common Law or Under Statute.

Allegations in an action under Sec. 5239 U. S. Rev. Stat. by stockholders against the directors of a national bank that certain directors mismanaged the affairs of the bank and certain other directors, elected after the acts of mismanagement were committed, knew or would have known if they had discharged their duty, the wrongful acts complained of, neither allege knowledge or negligence, express violation of the statute or the common law obligation of the directors.

10. Action for Accounting is Exclusively Equitable and Governed by Ten Years' Limitation.

An action by stockholders of a national bank in their representative capacity against its directors personally, for mismanagement of the affairs of the bank, involving an accounting, is an exclusively equitable proceeding and is governed by the ten years' statute of limitations, prescribed by Gen. Code 11227 and not the four years' limitation, prescribed by Gen. Code 11224.

11. Action by Stockholders for Loss of Stock Accrues From Time of Actual Loss.

An action by stockholders against directors for loss of stock by mismanagement is distinguished from an action by a receiver for loss of corporate assets and, hence, does not accrue as of the date of the mismanagement but from the date the loss actually occurs.

12. Distinction Between Suits in Equity and Actions at Law not Abrogated.

Notwithstanding Gen. Code 11238, providing that there shall be but one form of action, the distinction between suits in equity and actions at law, has not been abrogated. Observance of this distinction is essential to a proper application of the rule of limitation to the particular cause of action. Hence the statement that since the distinction between suits in equity and actions at law has been abrogated, the provisions of the statutes of limitation apply to all civil actions, whether therefore legal or equitable, is misleading and erroneous.

13. Directors of Banks, Required to Exercise Ordinary Care Only, do not Assume Liability for Prior Acts of Directors.

Directors of a national bank, elected after consolidation with another bank and following its organization as such are not, under the rule of ordinary care required of them, liable personally for the mismanagement or misfeasance of former directors by which the stock of the bank was rendered valueless, especially if the new directors constituted a minority of

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the board and relied on the reports of the bank examiners and comptroller of the currency, notwithstanding an investigation of prior management of the bank would have disclosed the insolvency of the bank as a fact.

14. Insufficient Allegations to Charge Directors Elected Subsequently to Bank's Insolvency, With Personal Liability for Loss of Stock.

Allegations, in an action for misfeasance of directors of a national bank, charging directors elected after such misfeasance, with circulating abstracts from government reports of the bank's solvency by which the bank was kept open for a period of twenty-one months longer, do not aver cause for diminution of its assets to render the new directors personally liable, especially since it is alleged that there are sufficient assets to pay debts.

[Syllabus approved by the court.]

HEARING on motions and demurrers.

M. R. Patterson and D. K. Watson, for plaintiffs:

Cited and commented upon by the following authorities:

Briggs v. Spaulding, 141 U. S. 132 [11 Sup. Ct. Rep. 924; 35 L. Ed. 662]; *Mason v. Moore*, 73 Ohio St. 275 [76 N. E. Rep. 932; 4 L. R. A. (N. S.) 597; 4 Ann. Cas. 240]; *Shea v. Mabry*, 69 Tenn. (1 Lea) 319; *Marshall v. Bank*, 85 Va. 676 [8 S. E. Rep. 586; 2 L. R. A. 534; 17 Am. St. Rep. 84]; *Cooper v. Hill*, 94 Fed. Rep. 582 [36 C. C. A. 402]; 2 Lewis, Trusts p. 1220; *Rankin v. Cooper*, 149 Fed. Rep. 1010; *Warner v. Penoyer*, 91 Fed. Rep. 587 [33 C. C. A. 222]; *Williams v. McKay*, 46 N. J. Eq. 25 [18 Atl. Rep. 824]; *Gibbons v. Anderson*, 80 Fed. Rep. 345; *Ackerman v. Halsey*, 37 N. J. Eq. 363; *Allen v. Luke*, 141 Fed. Rep. 694; *Brinkerhoff v. Bostwick*, 88 N. Y. 52; *Chetwood, In re*, 165 U. S. 443 [17 Sup. Ct. Rep. 385]; *Hayden v. Thompson*, 71 Fed. Rep. 60 [17 C. C. A. 592]; *National Bank v. Wade*, 84 Fed. Rep. 10; *Flynn v. Bank*, 122 Mich. 642 [81 N. W. Rep. 572]; Smith, Receivers p. 429; *King v. Pomeroy*, 121 Fed. Rep. 290 [58 C. C. A. 209]; *Irons v. Bank*, Fed. Cas. 7068 (6 Biss.) 301; *Richmond v. Irons*, 121 U. S. 27 [7 Sup. Ct. Rep. 788; 30 L. Ed. 864]; *Boyd v. Schneider*, 31 Fed. Rep. 223 [65 C. C. A. 304]; *Zinn v. Baxter*, 65 Ohio St. 341 [62 N. E. Rep. 327]; *Dissette v. Publishing Co.* 29 O. C. C. 168 (9 N. S. 118); *Moore v. Mining Co.* 104 N. C. 534 [10 S. E. Rep. 679]; *Gray v. Kerr*, 46 Ohio St. 652 [23 N. E. Rep. 136].

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Vorys, Sater, Seymour & Pease, A. H. Johnson, Wilson & Rector, Harry West, J. M. Hengst, E. C. Morton, Booth, Keating, Peters & Pomerene, C. S. Cherrington, Gumble & Gumble and J. M. Butler, for defendants.

KINKEAD, J.

This case is again before the court on motions made by defendants Orr, Smith and others to the amended petition, and a demurrer by defendant, J. W. Meek.

The demurrer questions the legal capacity of the plaintiffs to sue; claims that there is a misjoinder of parties, plaintiffs and defendants; misjoinder of several causes; separate causes against several defendants improperly joined; that the action is barred by the statute of limitations, and that the petition does not state facts sufficient to constitute a cause of action.

The first question to be considered is whether plaintiffs have the right to bring this action.

THE PETITION.

The plaintiffs are stockholders in the Union National Bank and in that capacity bring the action against directors of the bank for mismanagement of the affairs of the bank. The petition alleges that:

“Plaintiffs bring this suit in behalf of themselves and all other stockholders of the Union National Bank, which said stockholders are numerous and residing in various counties of the state of Ohio and in other states.”

From the petition it appears that the comptroller of the currency of the United States took possession of the bank and appointed one R. W. Goodhart receiver, who is now engaged in liquidating and winding up the affairs of the bank, “but plaintiffs aver that said receiver is not a suitable person and is disqualified to bring and maintain this suit because the comptroller of the currency aided and abetted in the acts of misfeasance herein complained of.”

The acts which go to this alleged disqualification are that the Union National Bank, when it started into business, bought

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and took over from the Merchants & Manufacturers National Bank (its predecessor) notes and bills to the amount and face value of \$2,461,208.56, which were owned by the latter bank and were given to it in the course of its business for money loaned, except one note for \$73,997.59 which was executed direct by the Merchants & Manufacturers National Bank to the Union National Bank. The consideration for the purchase of these securities by the Union National was the undertaking by the latter to pay the debts and deposit accounts of the Merchants & Manufacturers National Bank, amounting to \$3,576,120.44. It is charged that the Union National, from the purchase as above until it was closed, paid and continued to pay such debts and deposits from its capital and other assets, and that the assets now in the hands of the receiver are sufficient to pay the debts of the Union National including the debts assumed by it of the Merchants & Manufacturers Bank.

It is charged that a large amount of such notes so taken over from the Merchants & Manufacturers Bank, and which were carried as assets, were of little or no value, and are mentioned and described in the petition and amount in all to many thousands of dollars.

It is averred that the Union National Bank was at the time it commenced business and up to March 30, 1910, totally insolvent by reason of the worthless assets so taken over from the Merchants & Manufacturers National Bank.

It is then averred that about February, 1910, the business of the Union National Bank became injuriously affected by a suit in this court against certain stockholders of the Merchants & Manufacturers National Bank, which involved the management of that bank; that directors of the Union National Bank became apprehensive that they would not be able to continue the business of the Union National Bank without improving its financial condition and called to their assistance the comptroller of the currency who sent a representative to assist defendants in that behalf, and who continued to render such service until after March 30, 1910. The losses to the Union National Bank at that period, it is averred, arising from the worthless paper and assets taken over from the Merchants & Manufacturers

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National Bank were more than \$1,000,000, which was known to the defendant directors.

On March 30, 1910, there was charged off the books of the Union National Bank on account of the foregoing worthless notes the sum of \$921,022.04. To restore that loss certain promissory notes were procured to be made by the persons named in the petition, a part of which were given to the receiver of the Merchants & Manufacturers National Bank appointed by the comptroller to enable said defendant directors, it is alleged, to settle the actions pending against them in the federal and state courts, a part of said defendant directors, Schoedinger, Courtright, Hubbard, Livesay and Peters, confessing judgment against them for \$240,000, their notes being taken by the receiver of the Merchants & Manufacturers National Bank who receipted the judgment in full. The Union National Bank by virtue of a certain contract alleged in the petition claimed the proceeds of the judgment, in pursuance of which the notes of Livesay and Peters were transferred by the receiver of the Merchants & Manufacturers National Bank to the Union National Bank.

It is averred that some of the defendant directors, named in the petition, to release themselves from liability for the losses to the bank, permitted certain transfers of notes, passing a resolution by the directory releasing certain of the directors from liability to the Union National Bank.

It is averred that certain pages of the general journal of the bank containing some of these transactions respecting the notes above mentioned, and the charging off of certain assets amounting to \$921,022.04, and whereon the said notes of said defendant directors so given to release themselves from liability to the bank for their negligent losses thereto were entered, and whereon other substituted assets were entered, have been abstracted, concealed, destroyed or lost, which was done to conceal the true financial condition of the bank.

It is charged in the petition that the comptroller of currency advised the abstraction of the pages by and through his representative, and in furtherance of a design to prevent the stockholders from knowing what had been done; that the

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comptroller wrote a letter addressed to the board of directors of the Union National Bank, April 1, 1910, which was spread upon the minutes of the board April 7, 1910, such letter stating that the capital of the bank of \$750,000 and its surplus of \$100,000 were unimpaired.

It is averred that on March 30, 1910, the bank building which cost \$300,000, and which had been carried on the books for that sum, was increased on the books in the sum of \$150,000 with the consent of the comptroller, which amount was put into the bond, stock and securities account, and which was to cover up the losses, was false and fictitious.

It is charged that the directors made loans to the Beggs Company in January, February and March, 1908, to an amount in excess of its capital stock, contrary to the National Bank act; that false and untrue reports were made during 1910 and 1911, and that false dividends were also declared.

RIGHT OF PLAINTIFFS TO MAINTAIN THIS ACTION.

GENERAL DOCTRINE IS THAT CORPORATION MUST BRING IT.

Considering the special demurrer questioning the right of plaintiffs as stockholders to bring this action, the general doctrine that for acts of gross neglect, fraud or violations of specific duties required by provision of the national banking act, on account of which the directors have wasted the assets or capital of a banking corporation, an action to recoup such losses from the directors is to be brought by the corporation itself. If it is in the hands of a receiver, then the latter must bring the action. The principle is that the corporation is the legal entity representing all interests, the duty being incumbent upon its officers to act in all matters of interest to creditors and stockholders. A receiver who is appointed by a court of common law and equity jurisdiction takes the place of and acts for the corporation and all interested in its affairs.

A question arises whether, under the provisions of the national bank act, and the facts and circumstances of this case, a receiver appointed by the comptroller of the currency to wind

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up the affairs of the bank and pay its debts occupies the same position as one appointed by a court.

To determine the question whether plaintiffs as stockholders have the right to maintain this action without first having made demand upon the receiver, under the allegations of the petition, it is essential to consider the powers and duties of bank receivers under federal law as well as the remedial right for redress of the two classes of acts alleged in the petition.

The function and duty of a receiver under Sec. 5234 U. S. Rev. Stat. is to collect all debts, dues and claims, sell or compound bad debts, sell real and personal property; and "if necessary, to pay the debts of such association, enforce the individual liability of the stockholders."

Under Sec. 1 of act June 30, 1876, a receiver appointed by the comptroller "shall proceed to close up such association, and enforce the personal liability of the shareholders as provided in Sec. 5234."

An individual or personal liability is imposed upon directors of a national banking association who "knowingly violate, or knowingly permit any of its officers, agents or servants of the association to violate any provisions of this title * * * (and) in cases of such violation, every director who participated in or assented to the same shall be liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person shall have sustained in consequence of such violation."

But nowhere is any statutory duty specifically imposed upon the receiver in respect of such statutory liability or duty.

Receivers of national banks are federal statutory officers for certain prescribed purposes with limited powers and duties, whose powers are in no wise comparable with those which may be conferred by common law and equity courts upon receivers appointed by them.

National banks are creatures of the national government which has prescribed an arbitrary and peremptory method of closing and winding up its affairs through officers called receivers. A receiver of a national bank appointed by the comptroller is only authorized to proceed by action to sell or

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compound bad or doubtful debts, or to sell real or personal property, for the purpose of paying debts. But to do other acts in the course of his duty, he must have the incidental power to proceed by action in courts; for instance to enforce the shareholders' liability when necessary to pay debts, and to bring other legal actions.

And the receiver would, no doubt, have the right to proceed by action to enforce the personal liability of directors, if such liability is necessary to the payment of debts of the bank.

My study of the federal statutes and their policy leads me to believe that the design thereof is to primarily protect creditors, and if the assets in the hands of the receiver prove sufficient to liquidate the debts, the receiver would not in the very nature of things be continued to carry on lawsuits to enforce common law liabilities which are within the exclusive province of courts, unless such power is taken away by legislation and vested somewhere else. Such is not the case here, but on the contrary, as we have shown, the powers of receivers so far as the federal statutes go, are limited.

A receiver appointed by a court may not bring an action to enforce a common law liability of directors without express authority; hence, *a fortiori* it seems reasonable to conclude that a statutory receiver can have no power except that expressly prescribed or which is incidentally necessary to carry out other powers expressly conferred. If we are right in the view that the receiver is authorized to wind up the bank to the end that the debts are paid, then he may not bring such an action as this, unless it be necessary to recoup the losses of the assets by the misfeasance of directors in order to pay debts.

The rule requiring a suit like this to be brought in the name of the corporation may not exactly be considered a mere technicality, because the theory is that whatever is recovered must pass through the corporate channel for the benefit of all creditors and stockholders. But it does seem that in a case like this, where a national bank is in the hands of a federal receiver who is winding it up, and where it is averred that there are sufficient assets in the hands of the receiver to pay the debts, and because of the provisions of the federal law as pointed out,

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substantial justice can be more readily done by a court of equity by permitting shareholders to bring such an action as this in their own name, under the circumstances appearing in this case.

Vice Chancellor Wigram in *Foss v. Harbottle*, 2 Hare 461, although laying down the general rule in terms so emphatic as to have become classic, nevertheless very clearly indicated an exception in these words:

“If a case should arise of injury to a corporation by some of its members, for which no adequate remedy remained, except that of a suit by individual corporations in their private characters, and asking in such character the protection of those rights to which in their corporate character they were entitled, I can not but think that the claims of justice would be superior to any difficulties arising out of technical rules respecting the mode in which corporations are required to sue.”

So, I am of the opinion here that a stockholder may sue in his own name where the claims of justice demand and where no other adequate remedy exists for the wrong which the corporation has suffered. This is a principle that may well be applied under circumstances where the claims of justice demand, and no other remedy exists for the wrong which the corporation has suffered.

A number of federal court decisions are cited by counsel for defendants to the effect that a stockholder of an insolvent bank for which a receiver has been appointed (by the comptroller) can not sue the directors for loss of funds on account of mismanagement or neglect of directors to enforce the personal liability arising from violation of either common law or statutory law. But examination of these cases disclose that the holdings are based upon the ground that such action is either by an individual stockholder for the enforcement of a duty due and owing to the corporation for the benefit equally of all the creditors and stockholders, when the injury is done to the whole body of stockholders for which an individual stockholder may not sue on his own account, or when the action is primarily for the benefit of creditors and secondarily for the benefit of stockholders, or for both combined, in which case the rights of

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creditors draw the case within the province of the corporation or its receiver.

Allen v. Luke, 141 Fed. Rep. 695: (In behalf of both creditors and stockholders.)

Bailey v. Mosher, 63 Fed. Rep. 488 [11 C. C. A. 304]: (The recovery was sought by a creditor.)

National Exch. Bank v. Peters, 44 Fed. Rep. 13: (Was by creditors.)

Boyd v. Schneider, 131 Fed. Rep. 223 [65 C. C. A. 209], was a suit by depositors of an insolvent bank. The court met the claim that the recovery would be an asset of the bank vested by law in the receiver, and not one which creditors can bring, by the reasoning that:

"It seems clear * * * that * * * the directors are answerable in some kind of an action directly to the persons to whom the duty ran; and that, to the extent the depositors suffered losses therefrom, the right of action, whatever it may be, runs directly to the depositors as a class. The question is not determined by whether the amount thus recovered might not become an asset of the bank, but whether, aside from that, the depositors may not enforce the liability as a right special to them, a right growing out of the contract of deposit, and not common, therefore, to stockholders," etc.

The right thus to sue, without the intervention of the receiver, seems to be sustained, indirectly at least, in *Briggs v. Spaulding*, 141 U. S. 132 [11 Sup. Ct. Rep. 924; 35 L. Ed. 662].

But in none of them is the question squarely presented and decided, with the exception of the decision by Judge Sage in *Howe v. Barney*, 7 O. F. D. 8 [45 Fed. Rep. 668], which we can not follow, that stockholders may not maintain an action for the benefit of all stockholders for injury done to all of them as a body, where it appears that the assets in the hands of the receiver are adequate to liquidate all the debts of the corporation, and nothing remains to be done but to determine the right of recovery for the benefit of all the stockholders for losses of their stock.

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SUIT FOR KNOWINGLY VIOLATING PROVISIONS OF THE BANKING ACT.

The question is raised by the demurrer, under some of the allegations in the petition, that the right to sue for the damages resulting from acts of known violations by directors of any of the provisions of the banking act does not exist in the plaintiff stockholders in this form of action.

It is contended that Sec. 5239 U. S. Rev. Stat. prescribed an exclusive remedy for such acts, which, in cases where a national bank is in the hands of a federal receiver, must be brought by such receiver. Section 5239 is as follows:

Section 156. "If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this title, all the rights, privileges, and franchises of the association shall thereby be forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district or territorial court of the United States, in a suit brought for that purpose by the comptroller of the currency, in his own name, before the association shall be declared dissolved."

Section 157. "And in cases of such violation every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person shall have sustained in consequence of such violation."

It is held in *National Exch. Bank v. Peters*, *supra*, that this section prescribes an exclusive method of enforcing the liability of directors for violation of the banking act.

Zinn v. Baxter, 65 Ohio St. 341 [62 N. E. Rep. 327], is urged as a conclusive authority to the same effect. The precise question decided in that case was that one who has been a shareholder in a national bank, but who has parted with his stock, can not maintain an action for damages resulting to him individually and for his own benefit alone, while the bank is a going concern, and has not been dissolved by proper action by the comptroller of the currency in a federal court.

It was not decided whether stockholders may bring such

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action after such dissolution, although the rule is laid down in the first proposition of the syllabus to the effect that:

"Where the directors of a national bank have violated the provisions of the National Banking act, to the damage of the bank and its shareholders, and the bank fails, upon request to bring an action against such directors for the recovery of such damages, an action may be maintained for that purpose by a shareholder; but such action must be brought by such shareholder on behalf of himself and all other shareholders, the bank must be made a party, the judgment must be in its favor, and the proceeds of such judgment will inure to the common benefit of all the shareholders alike. Such action may be brought in a state court."

The above quoted syllabus was only the reasoning leading to the point actually decided. But it is a distinct recognition of the right of stockholders, when the bank fails, to bring an action for damages resulting from specific violations of the national bank act in the state court.

And by counsel for defendants it is claimed to be conclusive of the duty required of stockholders to make demand upon the receiver to bring this action.

Zinn v. Baxter, supra, so far as concerns the point decided is not an authority, but its reasoning is helpful, and supports the view which we have taken of Sec. 5239 U.S. Rev. Stat. This section authorizes the comptroller to bring action in the federal court to forfeit the franchise of a bank for acts of directors knowingly violating any provisions of the banking act. This the comptroller did not do in the case of this bank. On the contrary, he appointed a receiver to close up the affairs of the association for one of the reasons, or upon one of the grounds, specified by Sec. 452 of the National Bank act, no doubt for failure of such bank to make good impairment of its capital. Sec. 5205 U. S. Rev. Stat.

That part of Sec. 5239 prescribing a personal liability on the part of directors for knowingly violating provisions of the banking act is a matter entirely separate and distinct from the remedy prescribed for forfeiting the franchise. It is in fact the creation of a statutory liability, the statute being entirely silent on the question when and where the action for its enforcement

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may be maintained. But, clearly, shareholders are given the right to recover under the statute, and this right was recognized in *Zinn v. Baxter*, *supra*.

Who may enforce this liability, will depend upon the fact whether its enforcement is essential to make good the loss of assets to pay debts, or to make good the loss to the stockholders.

If the enforcement of the obligation is not necessary to the payment of creditors, it is then within the power of common law courts to enforce the liability in a proper action for the benefit of the whole body of stockholders, if their rights as such have been destroyed by such violation.

INSOLVENCY OF BANK—ASSETS SUFFICIENT TO PAY DEBTS.

The allegations in the petition are that the bank was insolvent from the time it took over the assets of the old bank, and that it practically remained so throughout.

Insolvency of the bank means that it cannot alone pay its debts, but it cannot pay its stockholders which is a liability. If the receiver has enough assets with which to pay debts, and nothing more, then, it is demonstrated that the corporation is at an end, and that the stockholders are the persons who sustain the loss.

FORFEITURE OF FRANCHISE OF BANK NOTHING TO DO WITH THE CASE.

The arguments presented that there must first be a forfeiture of the franchise as a prerequisite to the enforcement of the liability under Sec. 5239 are discussed in *Welles v. Graves*, 41 Fed. Rep. 459, is not well taken, because Sec. 5234 authorizes the receiver to enforce the individual liability of stockholders to pay debts, which is a double liability and has no relation whatever to the personal liability of directors. Besides, it is later held not a necessary condition precedent that violations of the banking act should have been previously adjudged in a suit brought by the comptroller. *Allen v. Luke*, *supra*.

The closing out of the business of a bank by a receiver is an effectual end of the bank, and it may not continue to exercise

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its franchise without rehabilitation of its assets in some way with the approval of the comptroller.

So there seems to be no merit whatever in the claim that an action like this cannot even be brought by the receiver until the franchise is forfeited.

The corporation is as well as dissolved for all practical purposes. In as much as its affairs are all in the hands of the federal receiver for the payment of its debts, and there is enough assets in the receiver's hands to pay the same, nothing remains for the corporate entity to do by itself, nor the receiver, after the debts are paid.

That being so there is nothing remaining but the determination of the rights and liabilities arising from the allegations in the petition between stockholders and directors.

MAY RECOVERY BE HAD FOR VIOLATION OF COMMON LAW DUTY AND
STATUTORY DUTY UNDER NATIONAL BANKING ACT BY STOCK-
HOLDERS' SUIT?

Without calling specific attention to the grounds of complaint it is clear that they charge both common law liability as well as violation of statutory duty both by neglect and knowingly.

There is no exclusive remedy for violation of the national bank act either neglecting, or knowingly under Sec. 5239. As already stated the federal statute prescribes the exclusive test or measure of duty when claim is made under them.

The determination of both classes of liability are within the power of this court, the statutory liability being determinable under the statute in so far as the particular acts fall within the statute.

Whatever the liability may be the powers prescribed by Sec. 5234 upon the receiver are to be exercised only when necessary to pay debts.

Burkett, J., in *Zinn v. Baxter*, *supra*, on page 367, stated: "The correct rule is, that as congress has legislated upon the subject, and given and defined the right of action, the right then given by congress is the only right, and that the action must be

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maintained under the act of congress or fail; and that the liability of the directors of a national bank is measured by that act alone, and can not be enlarged or changed by the common law or rules of equity."

The judge then refers to *Briggs v. Spaulding, supra*, which was a bill by a receiver of a national bank against the directors for damages, the charges being independently of the acts of congress that they were liable as trustees for the bank, its stockholders and creditors, stating that the court disposed of the case in favor of the directors upon the provisions of the national banking act alone. Burkett, J., further adds:

"The duty of directors being declared by that act, as well as their liability for the violation of that duty, it is competent to resort to the common law and rules of equity to ascertain whether such duty has been properly performed. * * * It is therefore clear that the common law and rules of equity can not be invoked in opposition to the acts of congress to enable a shareholder in an action * * * to maintain such action against the directors, after he has parted with his stock."

Sec. 5239 imposes a personal and individual liability for damages upon directors who knowingly violate or knowingly permit officers to violate provisions of the banking act.

There is a wide distinction between knowingly violating some one or more of the national bank statutes, and acts which are purely negligent. While this statute prescribes "The statutory standard of liability" for express violations of national bank statutory provisions, as stated in *Mason v. Moore*, 73 Ohio St. 275, 290 [76 N. E. Rep. 932; 4 L. R. A. (N. S.) 597; 4 Ann. Cas. 240], it does not as stated in the same opinion (p. 291) "preclude a liability at common law."

The distinction between the statutory and common law liability is clearly drawn in the case of *Yates v. Bank*, 206 U. S. 158 [27 Sup. Ct. Rep. 638; 51 L. Ed. 1002], in the following language:

"Mark the contrast between the general common law duty to diligently and honestly administer the affairs of the association" (The language of Sec. 5147 prescribing oath of directors) "and the distinct emphasis embodied in the promise not to

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knowingly violate, or willingly permit to be violated, any provisions of this title. In other words, as the statute does not relieve the directors from the common law duty to be honest and diligent, the oath enacted responds to such requirements. But as, on the other hand, the statute imposes certain express duties and makes a knowing violation of such commands the test of civil liability, the oath in this regard also conforms to the requirements of the statute by the promise not to knowingly violate, or willingly permit to be violated, any of the provisions of this title."

"In other words" the court says "as the statute does not relieve the directors from the common law duty to be honest and diligent, the oath exactly responds to such requirements."

The rule established by the Supreme Court of the United States is that:

"Where a statute creates a duty and proscribes a penalty for its nonperformance the rule prescribed by the statute is the exclusive test of liability.

"The National Banking act (Rev. Stat. 5239) affords the exclusive rule by which to measure the right to recover damages from directors, based upon a loss resulting solely from their violation of duty expressly imposed upon them by a provision of the act. * * *

"Where by a statute a responsibility is made to arise from its violation knowingly, proof of something more than negligence is required; and that the violation was in effect intentional."

Yates v. Banks, and *Allen v. Luke*, *supra*.

Here the distinction between the negligent performance of acts and an intentional act knowingly violating some provision of the act is clearly drawn.

These distinctions have some bearing on the question raised by the demurrer whether the plaintiff stockholders may maintain this action, or whether they should have first demanded that the receiver bring the same.

The allegations concerning the violations of the provisions of the banking act do not however clearly and definitely charge the same to have been knowingly committed, being in the alternative, as having been either knowingly done, or due to neglect.

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There is nowhere either in Sec. 5239 or elsewhere any provision authorizing a receiver to collect the damages for the statutory liability created for the benefit of stockholders where the rights of creditors are not involved.

And it is within the right of the plaintiffs to claim recovery for such acts in the state courts.

ALLEGATIONS AGAINST THE COMPTROLLER.

While the receiver is a person acting under authority of federal law, and having the powers thus conferred, he is in a measure representing the office of comptroller of the treasury. The allegations made in respect to the participation of the comptroller in the various acts of the bank are of such a nature and character as to press themselves upon the consideration of a court of equity charged by law with the duty of conserving the rights of stockholders under the common and statutory law, and may appropriately be considered as an additional reason why the court should recognize the right of the stockholders to maintain the action in its present form.

For the reasons stated the ground of demurrer that plaintiffs have not the right to maintain this action is overruled.

IS A CAUSE OF ACTION STATED? WHAT IS ITS NATURE AND CHARACTER? IS IT A SINGLE CAUSE OR MORE THAN ONE?

The directors of a banking corporation at common law are personally liable if they suffer corporate funds or property to be wasted or lost by gross negligence or inattention. They are also personally liable for all damages accruing under 5239 Rev. Stat. to stockholders, resulting from the directors themselves knowingly violating any provisions of the banking law, or for permitting any of its officers to violate the same. To permit is to have knowledge. The first act charged is in purchasing \$2,461,208.56 of notes and bills from the M. & M. National Bank, which were taken by the latter bank for money by it loaned, except one note for \$73,997.59 which was executed by the vendor bank to the Union National Bank, and it is incidentally alleged that the Union Bank took over their property and assets. In

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this purchase and sale, the Union Bank agreed to pay the debts of the M. & M. Bank amounting to \$3,576,120.44.

These assets were entered on the books of the Union to the present time. It is alleged that the bank was in fact insolvent at the time it commenced business.

A. Brenholts, F. W. Hubbard, E. K. Stewart, George J. Schoedinger, D. C. Beggs, J. W. Meek, C. K. Davis and E. A. Cole were each and all directors when the bank was organized, each continuing as such for variant times, Brenholts till April 7, 1910, Hubbard to January 10, 1911, Stewart to May 18, 1911, Schoedinger to June 16, 1910, Beggs to July 23, 1908, Meek to March 30, 1911, Davis to December 30, 1909, Cole to January 8, 1907.

We have here then for consideration what counsel have characterized the "original crime of 1905."

If the facts thus brought to the attention of the court be substantiated, we have not only the primary but the paramount cause of the failure of the bank.

The responsibility of this act, if there is any liability under the law, must be classed as a common law obligation determinable alone by its principles.

Though the petition charges that the directors knew of the worthless character of the securities, it does not come within any provision of the national banking act.

The statement of these facts discloses a liability of the directors under the law.

The next act occurring about February, 1910, when it is alleged that the business of the Union National Bank became injuriously affected by an action against Courtright, Schoedinger, Hubbard and others to enforce a personal liability against them as directors in the M. & M. Bank, which suit involved the management of this bank.

The losses of the Union National between February 1, 1910, and to March 30, 1910, are alleged to be \$1,000,000. The comptroller of the treasury was called in for advice and assistance following which the amount of \$921,022.04 of the notes taken from the M. & M. Bank were charged off the books of the Union National, to restore which, and to make good the impairment of

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capital notes aggregating \$625,000 were given, by Jacobs \$70,000, Brenholts \$70,000, Schoedinger \$70,000, Courtright \$75,000, Stewart \$75,000, Boardman \$72,500, Ellison \$72,500, Hubbard \$50,000, Cole \$25,000, Livesay \$15,000, Peters \$30,000.

The notes of Schoedinger, Courtright, Hubbard, Livesay and Peters were given to the receiver of the M. & M. National Bank appointed about this time by the comptroller, and who settled the personal liability suit against the directors of the M. & M. Bank by a confession of a judgment for \$240,000, taking the notes as above in full settlement thereof, and which was turned over to the Union National Bank by such receiver in pursuance of a contract made February 4, 1905, by which the M. & M. Bank guaranteed the notes and bills to the Union National Bank.

It is averred (p. 21) that the "notes of defendants, Courtright, Stewart, Boardman, and Ellison were at the time they were taken, and at all times thereafter, of doubtful value on account of the insolvency of said makers, and went into and are now in the hands of said receiver. That each one of said persons, then directors, owed the bank for other large sums of money for money borrowed, which are stated in the petition.

In so far as this transaction is concerned, it will depend upon whether the directors acted in good faith, prudently or not, whether they believed, and had good reason to believe that the notes were good.

At any rate it clearly appears to have been an effort to make good the impairment of capital. No harm could come from it unless by continuing the bank longer under such circumstances some material injury and loss resulted.

In regard to the charges of the efforts of certain directors to be released from personal liability upon giving notes, an opinion is expressed that this does not go to the gist of the cause, but merely affects the question of liability and becomes an important link in the chain of acts which go to constitute the cause one in equity.

And the fact that some of the defendants have become directors at later periods and some have been directors longer than others is no ground of demurrer, because the court can dis-

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criminate between them and fix their liability according to the circumstances. *Ackerman v. Halsey*, 37 N. J. Eq. 356.

The necessity of adjusting this variant liability, independently of any question of accounting, is an essential fact constituting the cause one in equity.

The loans made to the D. C. Beggs Company, of which D. C. Beggs was a member, and also a director were during January, February and March, 1908, in excess of one-tenth of the capital of said bank. It is charged that the directors either knew the same to be excessive, or would have known thereof had they discharged their lawful duties.

This is not a correct allegation. It neither alleges knowledge, nor negligence. It is ordered to be made definite and certain, because it can not be determined whether it rests on the common law obligation or the statutory one under Sec. 5239.

Whichever it is, it is a proper matter to be taken into consideration in accounting for the losses, and it is for a court of equity to apportion any loss in capital that may have resulted therefrom. It does not amount to a separate cause of action.

From March 30, 1910, it is averred that the defendants knew of the decreasing responsibility of the debtors of the bank, or would have known it had they been diligent, etc.

Another indefinite allegation, which is ordered to be made definite.

It is then averred that from March 29, 1910, to September 1, 1911, eight reports of the condition of the bank were made, the truthfulness of which were attested by the directors named, and that each report contained the notes of Courtright, Stewart, Boardman and Ellison so given in an effort to release themselves from liability to the bank, and also the notes of the Beggs Company and other worthless notes.

It is alleged the surplus so exhibited by each of the reports did not exist; that the reports were known to be untrue reports by some of the directors, and if not so known by other directors it was because they did not give the affairs of said bank due and diligent attention, but were grossly negligent.

This allegation will have but little bearing on the liability of directors unless it can be clearly shown that by keeping the

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bank going under such conditions it caused material injury and loss. The harm was done prior to this. And if the assets will pay the debts, such reports will cut but little figure. The alleged neglect concerning reports of conditions of the bank and dividends may only have material bearing on the general conduct of the directors.

Four dividends are alleged to have been wrongfully declared in 1910 and 1911, the names of the directors participating therein being stated.

This is a proper item to be taken into a consideration in an accounting of the losses, but if all the stockholders who are now stockholders were then stockholders, the amount of dividends which they so unlawfully received will be deducted from their losses.

There is but one cause of action stated in the petition which is equitable. It is equitable because the liability can not be determined without resort to the extraordinary powers of a court of equity in taking an account of the losses, not necessarily a strict account of all the accounts and books of the bank, but of so much as may be necessary to determine the losses sustained by all the stockholders who are numerous and whose interests vary in amount; and because the liabilities of the several participating directors can only be determined in equity.

A bill to recover money of a bank alleged to have been lost through misconduct of directors is not bad for multifariousness, where the matters are such as can most conveniently be tried in a single suit. *Allen v. Luke, supra*. (The doctrine in *Emerson v. Gaither*, 103 Md. 564 [64 Atl. Rep. 26; 7 Ann. Cas. 1114], not followed.)

The assistance of equity is invoked, because without it the rights of the parties may not be ascertained with that fullness and certainty to which they are entitled. *Ackerman v. Halsey, supra*; *Halsey v. Ackerman*, 38 N. J. Eq. 509; *Brinkerhoff v. Bostwick*, 88 N. Y. 52; *Brinkerhoff v. Bostwick*, 105 N. Y. 567 [12 N. E. Rep. 58]; *Crane v. Ely*, 37 N. J. Eq. 564; *Hornor v. Henning*, 93 U. S. 228 [23 L. Ed. 879]; *Horn Silver Min. Co. v. Ryan*, 42 Minn. 196 [44 N. W. Rep. 56].

The claim is that the facts stated do not constitute a cause

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of action which may call in question the amount of care exacted by law of directors of national banks.

"Directors of banking corporations occupy one of the most important and responsible of all business relations to the general public. Ordinarily, the character of the directorship for integrity and business capacity is the measure of the degree of confidence in the corporation by the public. The doctrine as almost universally supported by the authorities is to the effect that bank directors are not mere agents like cashiers, tellers and clerks, but that they sustain a further relation to the stockholders of trustees." Kinkead, Torts Sec. 134, p. 278, citing numerous cases. *Delano v. Cass*, 17 Ill. App. 531; *Delano v. Case*, 121 Ill. 247 [12 N. E. Rep. 676; 2 Am. St. Rep. 81]; *Williams v. McKay*, 40 N. J. Eq. (13 Stew.) 189 [53 Am. Rep. 775]; *Bliss v. Matteson*, 45 N. Y. 23, and other cases.

"The rule of liability as it is expressed by judicial precedent, perhaps without dissent, is that the directors of a banking corporation are personally liable if they suffer corporate funds or property to be wasted or lost through acts of fraud, or by gross negligence and inattention to the duties of their trust, etc." Kinkead, Torts Sec. 136; *Delano v. Case*, *supra*; *United Society of Shakers v. Underwood*, 72 Ky. (9 Bush.) 609 [15 Am. Rep. 731]; *Ackerman v. Halsey*, *supra*; *Williams v. McKay*, *supra*; *Brinkerhoff v. Bostwick*, *supra*; *Sperring's Appeal*, 71 Pa. St. 11 [10 Am. Rep. 684]; *Miesse v. Loren*, 8 Dec. 448 (5 N. P. 307); *Horn Silver Min. Co. v. Ryan*, *supra*.

"The measure of care required of bank directors, while variously expressed, on the whole may be reduced to a rule upon which judicial precedent pretty generally unites, viz: that degree of care which ordinarily prudent persons would ordinarily exercise. The true rule would seem to be that bank directors must use ordinary care and prudence in the trust committed to them, such care as ordinarily prudent men would use, not in their own business, but in the business intrusted to them, the proper performance of their duties to be determined in each case in view of all the circumstances (this being the invariable rule for deciding negligent acts), the character and condition of the business, and the methods usually adapted in the banking busi-

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ness." They must give such reasonable care and attention to the supervision and direction of those placed in charge as may be reasonably necessary under the circumstances.'" (Kinkead, Torts Sec. 135, and extended note with cases quoted.)

See other cases, *Briggs v. Spaulding*, 141 U. S. 132 [11 Sup. Ct. Rep. 924; 35 L. Ed. 662]; *Mason v. Moore*, 73 Ohio St. 275 [76 N. E. Rep. 932; 4 L. R. A. (N. S.) 597; 4 Ann. Cas. 240]; *Shea v. Mabry*, 69 Tenn. (1 Lea) 319; *Rankin v. Cooper*, 149 Fed. Rep. 1010; *Allen v. Luke*, 141 Fed. Rep. 694.

The chief neglect alleged centers on the paper taken over from the M. & M. Bank. And in respect to this it is alleged that "said defendants who were directors of said bank when said worthless or doubtful paper was so taken over, knew of its worthless and doubtful character and knew that said Union National Bank was insolvent as aforesaid, on account of the same, or if they did not have such knowledge it was because they did not give to said transaction and to the affairs of said bank due and diligent care and attention, but was derelict and negligent in the discharge of their duties as directors thereof."

The pleader evidently does not know upon which ground to base his claim. He evidently does not know whether to charge negligence or knowledge and intentional act. Ordinary prudence would require directors to have the facts with reference to the taking over of the assets of the old bank explained and laid before them. If they were, and the directors exercised their best judgment, that is one thing, if they were not that is another. Under all the circumstances of the case it is within the right and duty of the court to give effect to this alternative charge.

The court holds that sufficient facts are stated to constitute a cause of action against these defendants who may have been guilty of neglect which contributed to the losses complained of, and especially against Brenholts, Hubbard, Stewart, Schoedinger, Beggs, Meek, Davis and Cole who were directors from the organization of the bank.

The liability of the remaining directors is of doubtful character, some of them probably sustaining no liability at all.

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STATUTE OF LIMITATIONS.

The conclusion being that the cause of action is equitable it follows that the ten year limitation governs.

It is fundamental that the limitation applicable to equitable remedies is ten years, we need no citation of authority on such proposition.

The demurrer of J. W. Meek in its entirety is overruled.

MOTIONS.

Motion of D. C. Beggs overruled.

Motion by H. C. Dean.

Mr. Dean became a director January 10, 1911, remaining at the present time. Three reports were made during his service, and two dividends. He voted for one of them. I can see no liability on account of the reports, because there is no injury known to have resulted therefrom.

For these reasons the motion to dismiss Mr. Dean from the case is overruled, and all other grounds of his motion are overruled.

Motion by C. S. David.

Mr. David became a director June 1, 1911. His position is like that of Mr. Dean. Two reports of the conditions of the bank were made during his time, and one dividend was declared. I think the only possible liability on his part could be with reference to the dividend of October 30, 1911. On this account alone his motion is overruled.

Motion of J. H. Smith.

Mr. Smith became a director June 16, 1910. During his time, one report was made, and one dividend was declared. He is in the same position as Dean and David, and his motion is overruled for the same reasons.

Motion by L. D. Hagerty.

Judge Hagerty became a director June 30, 1910. One report was made, and one dividend was declared during his time. He sustains no liability unless it be on account of the dividend. His motion is overruled.

Motion of W. C. Orr.

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Mr. Orr became a director July 30, 1908, remaining until the present time.

The original action of taking over the assets of the M. & M. Bank had been done. He was a director when the losses of the bank were alleged to be \$1,000,000 and during the time when the notes were given to make good the impairment, when the Courtright and other notes were taken over from the receiver of the M. & M. Bank, when attempts to release certain ones was attempted, when the alleged false reports, and wrongful dividends were declared.

I could not now conclude with safety from the facts as they now appear whether there is in fact liability against any but the original directors.

The acts of increasing the value of the buildings, of making false reports of the condition of the bank, taking notes to make good the impairment of capital, would all tend to continue the bank, whether that was a good or bad thing the petition does not undertake to state.

The proceeding being considered equitable in character, in which the liabilities, if any, may be equitably adjusted, the court may properly retain all the parties until final hearing.

The motion of Mr. Orr is overruled.

HEARING ON DEMURRERS, MARCH 17, 1913.

RAISING PARTICULARLY THE QUESTION OF STATUTE OF LIMITATION.

DOES THE FOUR OR TEN YEAR LIMITATION APPLY?

Briefs are again submitted on a demurrer by one of the defendants on the claim that the cause of action is barred by the four year limitation under Par. 4 of Gen. Code 11224, making the four year limitation apply to an action: "for an injury to the rights of plaintiff not arising on contract not hereinafter enumerated."

In support of this contention cases are cited in which it is claimed the four or six year limitation is applied to equitable causes instead of the ten year limit, which it is claimed demonstrates that the four year limitation above applies and governs

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the action of plaintiff, though it be considered equitable in nature.

Counsel contend that if it be finally concluded, as the court has held on the previous demurrer by another defendant, that the ten year limitation is controlling, it will work revolution in the practice under the code, and will be in direct conflict with the whole spirit and purpose of the code. It is argued that the bar of the statute of limitations is to be based upon the act done, the duties omitted and wrongs suffered, and not upon the method or remedy chosen by the plaintiffs for the assertion of the grievances.

Attention is called to a statement in Kelly, Code Lim., that our code commissioners "applied the limitation to the substance or subject of the action, instead of to the form of the action." That is quite true. The subject of this action is the loss of the right of the stock of the stockholders in the corporation. The form of action in code procedure is by the civil action created by it; but it does not affect or change its cause of action, and statutes of limitation, while they go to the action, in substance and effect they regulate rights and causes of action.

Far be it from our purpose as counsel contend, to "absolutely" hold that all actions in equity are regulated and limited by the ten year limitation. We have not been unmindful of the decisions cited by counsel where equitable relief has been sought and had, and to which the limitations other than the ten year one have been applied. It may be remarked, however, that some of these cases have not been well enough considered to state the true grounds upon which they were made to rest. As we shall show, they have merely carried into effect or applied principles which are axiomatic and which have been a part of the law during the period when law and equity were separately administered, as well as since the union of law and equity in formal procedure.

It is a familiar maxim of procedural jurisprudence that in equity when there were no limitations applicable to causes therein, during the period when the doctrine of mere laches was applied, the rule was grounded or based on the analogies of the

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law. That is, in cases where the subject-matter was within the concurrent jurisdiction of law and equity, the latter applied by analogy the limitation of law. This is illustrated by cases grounded on fraud which are now, and always have been, within the concurrent jurisdiction of law and equity. In law the relief afforded in such cases is by way of compensation in damages, while in equity it is by way of cancellation. In seeking relief in equity, courts are loath to apply the remedy there sought, after the period limited by law for relief afforded by courts of law has expired. This phase of the question did not receive attention in the earlier cases of *Neilson v. Fry*, 16 Ohio St. 557 [91 Am. Dec. 110]; *Loffland v. Bush*, 26 Ohio St. 559 and *Carpenter v. Canal Co.* 35 Ohio St. 307, 316, although the decisions in those cases were in entire accord with the settled rules of construction, and are illustrative of the rule of practice which has so long prevailed.

From the earliest period in the history of the law of procedure courts of equity having no statutes of limitation applied the doctrine of laches instead, and naturally followed the like limitation prevailing at law. Different views have been expressed concerning the question whether equity courts applied the rule of limitation of the law upon the principle of analogy, or whether it was in fact in obedience to the statutory limitation. As long ago as *Hovender v. Annesley*, 2 Sch. and Lef. 607. Lord Chancellor Revesdale contended that though courts of equity were not within the words of the statute, still they were within their spirit and meaning, and therefore courts of equity acted in obedience to them, rather than by analogy to them. The same views were expressed by Chancellor Kent in *Kane v. Bloodgood*, 7 Johns. (N. Y.) 89, which became the early rule in New York, and is considered today as among the first and leading cases in this country. See also *Murray v. Coster*, 20 Johns. (N. Y.) 576 [11 Am. Dec. 333].

The subject naturally was dealt with, first, in New York, which was the pioneer code state. And the position of the courts of that state was made clear in the decisions from the earliest periods. For example, in *Butler v. Johnson*, 111 N. Y. 204 [18 N. E. Rep. 643], the court holding that the sections of the

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statute of limitation fixing the time for the commencement of what had theretofore been called a legal action, is described, it must, therefore, be taken to include causes of action over which courts of equity had theretofore concurrent jurisdiction; that the legislature must be taken to have contemplated the rule then existing, that equity followed the law in such cases, and that it was to be considered that the legislature virtually enacted for them the same limitation.

This became the settled rule in New York. The statutes first enacted in that state were taken from the English statutes and it was considered by the courts that the legislature and the courts adopted the rule previously existing that in all cases of concurrent and auxiliary jurisdiction, courts of equity were governed by the statute of limitations. Kelley, Code Lim. Sec. 48; 2 Story, Equity Sec. 1520. The rule of equity was that in cases where the subject-matter was within the exclusive jurisdiction, there being no statutory limitation to serve as a guide the court merely applied the equitable doctrine of laches. Kelley, Code Lim. Secs. 47, 49; 2 Story, Equity Sec. 1520; *Kane v. Bloodgood*, *supra*; *Boone v. Chiles*, 35 U. S. (10 Pet.) 177 [9 L. Ed. 388].

In 1830 a statute was passed in New York (Rev. Stat. 2 ed., 228, 229) which provided that: "whenever there was concurrent jurisdiction (not peculiar and exclusive jurisdiction) of any cause in courts of common law and courts of equity, the limitations there prescribed therein applied to courts of equity, same as courts of law."

Actions on account of fraud being within the concurrent jurisdiction of law and equity, of course, came under the same limitation, which accounts for the cases so strongly urged here by counsel in which relief in equity was sought, and to which the legal limitation was applied instead of the equitable one, viz., *Mason v. Henry*, 152 N. Y. 529 [46 N. E. Rep. 837]; *Loffland v. Bush*, *supra*.

It became the well settled rule in New York as evidenced by the earliest cases that in all other matters of equitable jurisdiction which were within the exclusive cognizance of courts of chancery, in which there was no concurrent jurisdiction in law,

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the ten year limitation was to be applied. The ten year limitation statute in New York was and is precisely like ours, and was and is like ours specifically designed to apply to and govern the limitation of such exclusive equitable causes and actions. This is well settled. *Kelley*, Code Lim. Sec. 52; *White v. Church*, 3 Lans. (N. Y.) 447; *Linsay v. Hyatt*, 4 Edw. Ch. (N. Y.) 97; *Rundle v. Allison*, 34 N. Y. 180; *Peters v. Delaplaine*, 49 N. Y. 362 (Specific performance); *Oakes v. Howell*, 27 How. Pr. (N. Y.) 145 (To reform instrument); *Montgomery v. Montgomery*, 3 Barb. Ch. (N. Y.) 132; *Borst v. Corey*, 15 N. Y. 505; *Butler v. Johnson*, *supra*; *Neilley, In re*, 95 N. Y. 382; *Gallup v. Bernd*, 132 N. Y. 370 [30 N. E. Rep. 743]; *Hoyt v. Tuthill*, 33 Hun. (N. Y.) 196.

The ten year statute is applied where the legal remedy is imperfect; *Rundle v. Allison*, *supra*, or where relief by action at law will result in a multiplicity of suits. *Hoyt v. Tuthill*, *supra*. It applies also to a suit for an accounting. *Gray v. Green*, 142 N. Y. 316 [37 N. E. Rep. 124; 40 Am. St. Rep. 596].

There can be nothing more convincing than these well established rules and construction, to which may be added the further important fact that in New York there is and has been for a long time a special statute, Sec. 394, which provides that:

“This chapter does not affect an action against a director or stockholder of a moneyed corporation or banking association to recover a penalty or a forfeiture, or to enforce a liability created by law, but such an action must be brought in three years.”

Mason v. Henry, *supra*, upon which counsel for defendants so strongly rely was an action by a receiver which the court held not to be within the sole jurisdiction of equity but one in which courts of law and equity had concurrent jurisdiction, the question of limitation involved being whether it was an action within the statute upon a liability express or implied, as the statute then stood.

Then we find the most conclusive case in that state on the questions here, in view of the statutory exception above quoted in *Brinckerhoff v. Bostwick*, 99 N. Y. 185 [1 N. E. Rep. 663], which, instead of being an action by the receiver, was an action

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by stockholders in their representative capacity against the directors of a banking corporation for an accounting, and for the neglect and inattention of the directors which resulted in the loss and waste of corporate funds. The court held that cause or action was not controlled by the above quoted section which excepted actions against directors of moneyed corporations, because the claim asserted by plaintiff was not "a liability created by law," and was not, therefore, within the later amendment of the statutes as to such actions against moneyed corporations, "to enforce a liability created by * * * Revised Statutes" entitled "Moneyed corporations" such actions to be brought within six years after the discovery by the aggrieved party of the liability created.

The court in the Brinckerhoff Case applied the ten year limitation because it held that it was "unquestionably an equitable action," "being simply the enforcement of a common law liability," the words "liability created by law" referring to a statutory liability, and not to a common law liability. We make the following quotation from the decision:

"The action was commenced by T. B., suing on his own behalf and for the benefit of the other stockholders of the bank; and, therefore, for the purpose of the statute of limitations, the action must be treated as if all the stockholders were plaintiffs. The action is really the action of all the stockholders as it was necessarily commenced in their behalf and for their benefit. It could not have been commenced by one stockholder for himself alone.

See *Cunningham v. Pell*, 5 Paige (N. Y.) 607, 613; *Cunningham v. Pell*, 6 Paige (N. Y.) 655 (a pioneer case).

This feature, that is, of the stockholders bringing the action in their representative capacity which renders it equitable, finds strong support in a *dictum* in *Mason v. Henry*, *supra*, which was an action brought by a receiver to compel the directors of a life insurance corporation to account for the assets fraudulently misapplied, which the court held to be within the concurrent jurisdiction of law and equity, and governed by the six year limitation. In discussing the character of the action after speaking

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of the function of a receiver in such action, the court in *Mason v. Henry, supra*, concludes that:

"The position of a stockholder or policy holder, in proceeding against the directors or trustees of a corporation, would be quite different with respect to the form of the remedy..

"He could not sue at law, but must sue in equity.

"His right of action is purely of an equitable character.

"Where directors or trustees, who are corporate agents, in the transactions of a corporate business, have committed the wrongful or illegal acts from which injury will accrue, or has accrued, to the corporate property and assets, a court of equity will entertain jurisdiction of a suit by a stockholder, or policy holder, in his own name, to obtain that relief which the corporation might have sued for itself."

The court in that case did, however, state that even if it could be conceded that the receiver brought the action exclusively in his character as trustee of the policy holders, it would be still subject to the six year limitation.

But the acknowledgment by the court of the exceptional character of the action, if brought by the stockholders, makes the holding in that case consistent with that in *Brinckerhoff v. Bostwick, supra*, so that it is not an authority contrary to the ruling made in the cause at bar, but its *dictum* is in support thereof.

Counsel have cited a large number of cases in their brief, all of which have been examined, and none of which touch the question involved by the demurrer. The difficulty with some of them is that they are governed by special statutes just as was the last New York case above referred to. This is true also of *Brown v. Clow*, 158 Ind. 403 [62 N. E. Rep. 1006].

Gores v. Field, 109 Wis. 408 [84 N. W. Rep. 867], was under Sec. 4252, Wis. Stat., 1898, providing that actions against directors or stockholders of a moneyed corporation or banking corporation being to enforce a liability created by law is limited to six years, because it refers to liabilities created by statute and not to common law liabilities. This case, in fact, followed or is consistent with the ruling in *Brinckerhoff v. Bostwick, supra*.

The decision by Judge Mathers in *State v. Bank*, 19 Dec.,

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82 (7 N. S. 43), is another case of the same character which is founded on a statute. That is, in this case there is a statute which authorized the prosecuting attorney to bring an action for moneys lost as provided in the statute. It is, therefore, clearly a statutory liability, and not a common law, liability, and, therefore, was properly governed by the six year limitation. The same is true of *National N. H. Bank v. Loan Co.* 61 Minn. 373 [63 N. W. Rep. 1079]; *Stone v. Rottman*, 183 Mo. 552 [82 S. W. Rep. 76], was clearly an action at law, the court stating, however, that "doubtless in a proper case the creditors might bring a suit in equity to subject to the payment of their demand claims of the corporation against directors for non-feasance."

If the fundamental principles had been clearly perceived, and the reasons and history of the subject set forth, we might not now have such strong protests as are made against the decision in this case as being revolutionary in character. The comments made by the learned judges in some of the cases in Ohio which are cited under this paragraph show a lack of appreciation of the intent and purpose of the code limitations. It is misleading to state that since the distinction between suits in equity and actions at law has been abrogated and the civil action substituted for them by the code of procedure, its provisions limiting the time for commencing actions apply to all civil actions, whether they be such as were theretofore of a legal or equitable nature, and must furnish the guide in determining the bar of the actions. *Gray v. Kerr*, 46 Ohio St. 657 [23 N. E. Rep. 136]; *Bryant v. Swetland*, 48 Ohio St. 206 [27 N. E. Rep. 100]; *Neilson v. Fry*, *supra*.

It is to be observed, however, that one of the learned judges who made the above comments referred to recognized the rules which have been set forth and reviewed in this opinion, in the later case of *Webster v. Bible Society*, 50 Ohio St. 1 [33 N. E. Rep. 297]. The question in the latter case was the applicability of the statute of limitations to a trust, it being held to be the well-settled rule since the code that only cases of technical, continuing, and subsisting trusts which are within the proper, peculiar, and exclusive jurisdiction of courts of equity, are

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exempt from the operation of statutes of limitation. *Paschell v. Hinderer*, 28 Ohio St. 368; *Yearly v. Long*, 40 Ohio St. 27; *Douglass v. Corry*, 46 Ohio St. 349 [21 N. E. Rep. 440; 15 Am. St. Rep. 604]. Other trusts, which might be the ground of an action at law, have always been subject to such statutes. Okey, J., in *Carpenter v. Canal Co.*, *supra*.

The distinction and the rule outlined in this opinion was also recognized by Johnson, J., in *Paschell v. Hinderer*, *supra*, where it was stated that:

"In all cases where there was a concurrent jurisdiction of the courts of law and equity for breaches of trusts, the rule was settled that the equitable action was barred in the same length of time as the action at law."

The learned judge refers to the case of *Kane v. Bloodgood*, *supra*, where all the authorities were ably reviewed by Chancellor Kent, the conclusion reached by him being generally accepted as the true solution of the vexed question.

Williams, J., in *Webster v. Bible Society*, *supra*, also quotes with approval the doctrine announced by Story, J., in *Pratt v. Northam*, Fed Cas. No. 11376 (5 Mason), 95, that: "In cases of concurrent jurisdiction it is clear that the courts of equity are bound by the statute of limitations equally with courts of law," as well as that of Lord Redesdale in *Havenden v. Annesley*, *supra*, and of Chancellor Kent in *Kane v. Bloodgood*, *supra*.

In view of the law which has been so well settled, and as to which there can seem to be no possible question, and which has received direct sanction and approval by the Ohio courts of last resort, the claims urged by counsel for defendants can surely have no foundation. The law as stated in this opinion is certainly conclusive that, if the decision reached that the cause of action in this case is equitable and within the exclusive cognizance of a court of equity, it is governed by the ten year limitation. Of this fact we are firmly convinced for the reasons stated in this opinion.

Under Gen. Code 11224: "For relief on the ground of fraud" we have the period of limitation for causes grounded on fraud either in law or in equity, because in causes of actual

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fraud, it falls within the concurrent jurisdiction of law and equity. There may be some question whether cases of constructive fraud are not governed by the ten year clause.

Our code was copied from that of New York and its adjudications and constructions are particularly applicable. *Neilson v. Fry, supra*, was an action at law for contribution, a subject within the concurrent jurisdiction of law and equity.

Subrogation is also a subject within the concurrent jurisdiction of law and equity, although the cases in this state have not made this distinction, and in a number of cases recently decided by the Supreme Court in dealing with the subject of trials by jury here is some *dicta* to be found in the opinions of Shauck, J., to the effect that such actions are legal and triable by a jury.

But in *Neal v. Nash*, 23 Ohio St. 483, which was an action by a surety to be subrogated to a judgment paid by him, it was held to be equitable. *Zuellig v. Hemerlie*, 60 Ohio St. 27 [53 N. E. Rep. 447; 71 Am. St. Rep. 707], is also a well considered case, where the primary purpose was to be subrogated to a mortgage held by the creditor, to which the ten year limitation was applied. *Combs v. Watson*, 32 Ohio St. 228, was under a statute and *Yearly v. Long, supra*, was an instance of the application of a limitation by analogy.

The rule to be applied to this case seems entirely clear. The cause of action of the plaintiffs, consisting in the loss of their right in stock in the corporation, under the facts of this case, must be held to be within the exclusive jurisdiction of equity, and can not, therefore, come under the bar of Par. 4, Sec. 11224 "For an injury to the rights of the plaintiff not arising on contract." The claim made by counsel for defendants that because the acts charged are those of neglect, that they must, therefore, come within this section, ignores the fundamentals of our remedial system as well as those elements which are controlling in the determination of the nature and character of the action, which have been fully stated in the previous opinions. The reasons set forth in this opinion, and especially the matters made clear for the first time, in this case, and the authorities cited, fully demonstrate that the ten year clause of the statute of limitations covers and applies to all cases within

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the exclusive cognizance of courts of equity. It must be conceded that the statute of limitations is to be construed in the light, and by the aid of the rules of common law and equity which we have endeavored to set forth.

The demurrer on the ground of the statute of limitations is overruled.

I feel like remarking that in the course of my examination it was discovered that under statutes creating a right of action against directors for loss of corporate assets, it was provided by such statutes that the right of action did not accrue until discovery of the loss.* An action by stockholders themselves for loss of their stock is clearly distinguishable from actions brought by a receiver for a recovery of the assets lost and wasted. It can not by any means be determined upon the face of the petition in this case that the cause now being asserted accrued at the date alleged in 1905, when the new bank took over the affairs of the old. It can not be absolutely inferred from the allegations that the plaintiff's stock was rendered valueless from that date, and that it was wholly lost. Under any view of the case, I am of the opinion that the cause did not accrue as of that date.

Considering the general demurrer by E. R. Graves, I am of the opinion that there are not sufficient facts alleged in the petition as it now stands to constitute a cause as against him. He was elected a director on May 25, 1911. There was a report made of the condition of the bank June 7, and September 11, 1911, and one dividend declared October 30, 1911, after Mr. Graves became a director.

The demurrer by the defendant Graves is, therefore, sustained for want of facts.

HEARING ON DEMURRERS APRIL 1, 1913.

QUESTION OF LIABILITY OF DIRECTORS COMING IN AFTER ACTS OF ORIGINAL DIRECTORS WHICH WERE PROXIMATE CAUSE OF LOSS.

General demurrers are interposed to the petition for want of facts by defendants, H. C. Dean, William C. Orr, J. H. Smith, C. S. David, and L. D. Hagerty.

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W. C. Orr was a director from July 30, 1908, to the close of the bank. J. H. Smith was a director from June 16, 1910, to the close of the bank. L. D. Hagerty was a director from June 30, 1910, to the close of the bank. H. C. Dean was a director from January 10, 1911, to the close of the bank. C. S. David was a director from June 1, 1911, to the close of the bank.

The acts which directly affect W. C. Orr, and, indirectly, affect the other demurrants, are those charged in the petition which relate to an action brought against the directors of the M. & M. Bank wherein it is alleged a receiver was asked about February, 1910, by reason whereof it is claimed that, "it became generally known, that said Union National Bank had taken over, when it started in business, a large amount of the assets of said Merchants & Manufacturers National Bank which was a doubtful and uncertain value, or of no value."

It is averred that by reason of that suit, and the developments therein, and of the fact that a large judgment was sought therein against Courtright, Schoedinger, Hubbard, and others, and the actual insolvency of the Union National Bank, the defendants who were directors at that time became apprehensive that they would not be able to continue the business of the Union National Bank without taking steps to end the suit, and to improve the financial condition of the Union National Bank. The losses at that time are alleged to have been \$1,000,000 of which it is claimed the directors were appraised; that only a part of the worthless paper taken over from the M. & M. Bank was charged off, to wit, \$921,022.04, which was on March 30, 1910.

It may be remarked in passing these facts that the pleader has probably placed his own conclusion upon them.

For the purpose of causing it to appear that the losses were fully restored, it is averred that certain promissory notes were procured by the persons named and delivered to the bank as follows: F. A. Jacobs for \$70,000; A. Brenholts for \$70,000; George J. Schoedinger for \$70,000; W. S. Courtright for \$75,000; E. K. Stewart for \$75,000; C. H. Boardman for \$72,000; J. D. Ellison for \$72,000; F. W. Hubbard for \$50,000; E. A. Cole for \$25,000; T. M. Livesay for \$15,000; G. M. Peters for \$30,000.

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All of the notes were made due and payable within five years, excepting that of T. M. Livesay, which was made upon demand.

The notes of Schoedinger, Courtright, Hubbard, and of Livesay and Peters were given to the receiver of the M. & M. Bank to settle the case brought against the directors for personal liability, a judgment against them for \$240,000, being by them confessed, which notes were in turn transferred to the Union National Bank, in pursuance of a claim made by the latter under the contract of February 4, 1905, by which the M. & M. Bank guaranteed the notes transferred to the Union Bank. It is averred that the purpose of Jacobs, Brenholts, Schoedinger, Courtright, Stewart, Boardman, Ellison and Hubbard in the execution and acceptance of the notes, (they being in control of the directory) was an attempt to release themselves from liability to the bank or the losses sustained by it through their negligence. It is also averred that in the deal concerning the notes certain common stock of the American Cash Register Company, owned by the bank but which was never carried on their books as assets, was transferred to Schoedinger, Courtright and Hubbard, and that said persons were released from liability to the bank for their negligence. A release of E. A. Cole from liability was also passed April 21, 1910, by the directors. On March 30, 1910, the alleged raising of the valuation of the bank building is said to have taken place. It is averred that the notes so re-entered in the loans and discounts "were not sound and bankable assets" and were not in value of more than one-half and were carried at their book value until its failure; that the notes of Courtright, Stewart, Boardman and Ellison were at all times of "doubtful value"; that the directors "knew or would have known by the exercise of due care," the persons above named "owed the bank for other large sums of money." That Courtright, Boardman, Ellison and Stewart had none of them paid much, if anything, on their notes and that they are insolvent.

The above quoted allegations directly affect W. C. Orr more than any of the present demurrants, his demurrer questioning the legal sufficiency of the petition and its amendment. It may be assumed that Orr was aware of the deficiency of the assets by

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reason of the worthless value of the securities, and of the charging off of some of them. Assuming that the old directors were endeavoring to recoup for the losses due to their neglect, the question arises whether there was any negligence in taking the notes of the several persons who are claimed to be insolvent. The alleged neglect consists in the taking of their notes, because it is claimed they were of doubtful value, and further because each one of the parties already owed the bank large sums of money, as well as the alleged value to restore the losses that actually existed at the time the notes were taken, and which continued to exist.

The effect of the alleged releases by giving notes, namely, that of Cole, Jacobs, Brenholts, Schoedinger, Courtright, Stewart, Boardman, Ellison and Hubbard, may be considered from two standpoints. So far as it concerns Brenholts, Hubbard, Stewart, Schoedinger, Courtright, Jacobs, Boardman and Ellison, they are to be considered as directors dealing with themselves and constituting a majority of the board and in virtual control of the bank. From the standpoint of their liability to the bank, their acts in this behalf can not be considered binding, if it was not commensurate with the extent of their liability. In such case it must be concluded that this question is now properly open to inquiry in this case.

But whether it was considered a reasonable, prudent thing to be done so as to affect other directors participating therein, viz., W. C. Orr, the present demurrants,—so as to affect their liability is a different question.

It is not an imprudent thing to make good the impairment of capital of the bank. If directors liable for losses were willing to make reasonable adjustment of their liability to the bank or losses chargeable to them, it was proper and commendable for them to do it; so was it proper for the disinterested directors to acquiesce in it provided what was done was fair and reasonable under all the circumstances. The question, then, is one of reasonableness of the settlement,—if one was made. Was the amount reasonable and were the notes reasonably good, and the best that could be obtained under all of the circumstances? The notes described and set forth in the petition alleged to have been

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worthless, aggregate the sum of \$1,000,870.30, although the petitioners aver that they are unable to determine from the books of the bank whether any of such notes were secured by collateral or otherwise secured, or afterwards reduced by partial payments, except the notes of Park and Morris, Morris, Sinks and Knox, aggregating \$117,510. Deducting this from the \$1,000,870.30, it leaves \$883,360.30 of impaired paper according to the theory of the petition. The aggregate of the notes given by the directors is \$625,000, \$240,000 of which were given to settle the action against certain of the directors of the M. & M. Bank. According to the figures of the petition, this would leave an apparent discrepancy or deficiency of \$258,360.30 of impaired assets not made good,—although the petition is uncertain in its averments whether the alleged worthless paper was further reduced by payments, or was secured by other collateral, so that the allegations of the petition itself leaves the question of deficiency, or loss, in doubt and uncertainty. Under such allegations and under all of the other circumstances appearing in the case, the court is warranted in presuming that the notes given by the several directors probably made good the apparent impairment of capital, and satisfied the bank examiner and comptroller of the currency. It is reasonable to suppose that the officers of the federal government who have almost unlimited discretion in the control of the bank were reasonably satisfied at the time that the impairment of the capital had been reasonably restored.

It is averred that Courtright, Stewart, Boardman and Ellison whose notes aggregated \$292,000 had not paid any part of their notes and that the same were of doubtful value at the time when taken. It is claimed that the real estate which cost \$300,000 was increased on the books to the amount of \$150,000, which amount was passed to the bond, stock and securities account. It might have been true that the real estate had reasonably increased to that amount, although it may have been irregular to have put it in the stock and securities account.

Whether there was any negligence chargeable to W. C. Orr by reason of his alleged participation in these acts, particularly in accepting the notes of Courtright, Stewart and Boardman,

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is the principal question affecting his liability as a director. Looking at this matter from the sole standpoint of Mr. Orr as a director, it is not unreasonable to assume that he acted in good faith, looking to the condition of the bank, and considering the notes that were offered, that he believed that it was the proper and ordinarily prudent thing to be done under all of the circumstances. The allegations of the petition in the light of all the development then and now containing the averment that the notes were of "doubtful value" may reasonably warrant the conclusion now under all the circumstances that Mr. Orr was prompted by a reasonable and ordinary belief that the notes were good. It could almost be said that even though these notes of the directors had been entirely worthless, that no harm actually resulted to the stockholders by their acceptance under all the circumstances of the case. Furthermore, Mr. Orr was in the minority in the directorate, and any protest that he might have wished to have made would have been unavailable as against the action of the majority of directors who were personally interested in relieving themselves from liability to the bank for losses. Looking even at the allegations of the petition and their indefinite character, there is not such an apparent or glaring discrepancy between the alleged losses and the face of the notes taken as justify the inference of gross neglect on the part of the directors in this note transaction. Furthermore, Orr could have done nothing but to protest, if there was occasion for it; and protest by him would not have been available if the interested majority directors persisted in doing what they apparently did.

Much stress is laid in the amendment to the petition that some of the directors,—other than those who afterwards became financially irresponsible,—were, during the continuance of the bank as a going concern, financially able to have made good, by due process, of law, the losses of the bank, but that the directors, neither collectively nor individually, took any steps or made any effort to have the losses restored, although the same were "readily discoverable and apparent from any proper and reasonable examination of the bank"; that the "directors never made or caused to be made any such examination," but "remained

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negligent and inactive in respect thereto and so permitted said losses to be carried unrestored, until they caused the failure of the bank."

As we view the claim the burden of it is that because some of these notes were of "doubtful value" and afterwards when the bank failed, they proved to be worthless, Orr, as well as the other demurrants, were negligent in not discovering the worthlessness of the assets which would be made apparent by an examination of the books.

It may be presumed that the pendency of the suits involving the personal liability of directors of the old bank on account of their acts in merging it into the new bank constituted some notice to the then directors of the difficulties concerning the assets taken over. In fact it seems rational to assume that all the subsequent directors were aware of the merger of the old bank into the new. But what effect would even that knowledge have upon the directors in respect to their duties? This quaere is directed more especially to the demurrants other than Orr. What was Mr. Orr's duty during the occurrence of the particular matters with which he was concerned? What were the duties of the other demurrants who came in much later than Mr. Orr? Was it the duty of the later directors to make special examination of the books, or to go to the clerks and officers of the bank for information and seek personal information about these matters?

We know that it is not the way that ordinarily prudent bank directors do; we know that they act upon the information and reports brought to them by their officers and employees who are paid for that purpose. We know that they must necessarily commit the business of the bank to the officers. We know, too, that this does not absolve them from the duty of a reasonable supervision. Indeed, the sum total of the duty of bank directors who serve without compensation, is to exercise such reasonable and ordinary supervision over the affairs of the bank as their duties reasonably and ordinarily demand or suggest. They are in no sense to be held as insurers of the fidelity of the officers, but they may, on the contrary, place the usual

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and ordinary reliance upon officers who bear good reputations for honesty and efficiency.

There is probably no dissent from the rule that directors are personally liable if they suffer corporate funds to be wasted or lost through fraud or by gross negligence and inattention to their trust. They are to use such care as ordinarily prudent bank directors ordinarily use in the banking business. Directors act as a body by their vote; or individual members of the directorate act as specially appointed committees, making reports of the matters committed to their care to the whole board. The board probably acts ordinarily only upon that which is brought before them either by their officers or committees or what they, themselves, may order to be brought before them. If anything occurs which ordinary prudence requires that special examination of the books or the securities of the bank be made, of course that should be required to be done.

Therefore it is apparent that more facts will have to be stated than are now stated to constitute a cause of action against these defendants.

We can do no better than to call attention to certain excerpts from the admittedly leading case of *Briggs v. Spaulding*, 141 U. S. 132, 133 [11 Sup. Ct. Rep. 924; 35 L. Ed. 662], which we put here in a partly modified form in our own language.

The degree of care required (in any kind of a case) depends upon the subject, and each case has to be determined by its own circumstances. There are certain things which in their management require the utmost diligence, and most scrupulous attention, and where the agent who undertakes their direction renders himself responsible for the slightest neglect. There are others where the duties imposed are presumed to call for nothing more than ordinary care and attention, and where the exercise of that degree of care suffices, the directors of banks from the nature of their undertaking fall within the class mentioned, while in the discharge of their ordinary duties. Other officers who serve for compensation have immediate management. Directors can not guard it by constant superintendence. The director's duties being those of control,—any neglect which will render them liable must depend upon the circumstances. If nothing has come to

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their knowledge to awaken suspicion of the fidelity of the president and cashier, ordinary attention to the affairs is sufficient. If they become acquainted with any fact calculated to put prudent men on their guard, a degree of care commensurate with the evil to be avoided is required.

It must be made to appear that the losses for which defendants are required to respond were the natural and necessary consequence of omission on their part. (p. 151.)

In any view the degree of care to which these defendants were bound is that which ordinarily prudent and diligent men would exercise under similar circumstances, and in determining that the restrictions of the statute and the usages of business should be taken into account. (p. 152.)

Johnson, one of the directors, was a depositor, was in the bank from time to time, and was informed that the bank was prosperous and that everything was going well. He signed the report marked 1182, sworn to by the cashier. He was informed that the report contained a correct exhibit of the condition of the bank, as shown by the books. It was testified to that it would have taken a month to ascertain whether the reports to the comptroller were correct; and that it was the duty of the comptroller and the bank examiner to do so. (p. 158.)

Even trustees are not liable for the wrongful acts of co-trustees, unless they connive at them or are guilty of negligence conducive to their commission. (p. 159.)

Knowledge of books and papers is not to be imputed to directors (p. 162) as Judge Earl said: "He was simply a director, and as such attended some of the meetings of the board of directors. As a director must we impute to him * * * a knowledge of all the affairs of the company? If the law requires this, then the position of a director in any large corporation, like a railroad, or banking, or insurance company, is one of constant peril. The affairs of such a company are generally, of necessity, largely entrusted to managing officers. The directors can not know, and have not the ability or knowledge requisite to learn, by their own efforts, the true condition of the affairs of the company. They select agents in whom they have confidence, and largely trust to them. They publish their

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statements and reports, relying upon the figures and facts furnished by such agents; and if the directors, when actually cognizant of no fraud, are to be made liable in an action * * * for any error or misstatement in such statement and reports, then we have a rule by which every director is made liable for any fraud that may be committed upon the company * * * in the diminution of its capital by any of its agents, and he becomes substantially an insurer of their fidelity. It has not been generally understood that such responsibility rested upon the directors of a corporation, and I know of no principle of law or rule of public policy which requires that it should." *Wake v. Dalley*, 51 N. Y. 27 [10 Am. Rep. 551.]

"We are of opinion that these defendants should not be subjected to liability upon the ground of want of ordinary care, because they did not compel the board of directors to make such an examination and did not themselves individually conduct an examination during the short period of service, or because they did not happen to go among the clerks and look through or call for and run over the bills receivable." (pp. 163-164.)

How shall these rules be applied here,—each case depending upon its own circumstances? As to Mr. Orr, even with knowledge on his part of the difficulties which confronted the bank, it can not be said that he owed an individual duty to examine the books. It must be taken for granted that he, together with his associates who were interested differently from him, were well advised in regard to the distress of the bank, so far as concerned its impairment of capital, for they had charged off assets, and attempted to make good the impairment. Mr. Orr, of course, according to the ordinary rule of prudence, presumably,—in the absence of negative averment,—learned the situation from the officers; and if he did he had the right to rely upon it, unless something occurred to cause him to distrust them, or which aroused his suspicion, and there is no allegation or circumstance here to the contrary. In fact, the only charge made against him in this behalf is that he did not do what he could to collect the notes of "doubtful values" taken

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to make good the impairment of capital, or rather that he, with other directors failed to take steps to restore the losses.

It should be assumed, of course, that Mr. Orr as a director was bound to take notice of the self-interest of the directors who gave their notes, and still whatever may have been his attitude in this matter, and the care exercised by him in regard thereto as an individual, it had little or no effect on what was actually done, because the directors who were interested in clearing themselves from liability were as alleged in the petition in virtual control of the board, and had evidently made up their minds to endeavor to save the bank by putting up the securities represented by their respective notes, and which did have the effect of prolonging the life of the bank, without apparent injury to the stockholders, because it is averred that there are now sufficient assets to pay the debts, and we can not speculate on what the bank might have made for the stockholders, if they had continued in business.

Furthermore, as to Mr. Orr, it may be said that as a director, he had the right to rely upon the report of the condition of the bank made by the officers, if they were of good repute, and he had no reason to suspect their dishonesty. And the petition makes no such claim. The fact that he knew that some of them were supposed to be liable for the losses of the bank is not sufficient warrant to charge him with bad faith in an act of accepting notes to make them good, if he honestly believed that that was the best thing to be done, and if ordinary care and prudence suggested this as the reasonably best thing that could be done. And there is nothing here to show that he failed to observe due and ordinary care in that matter. Plaintiffs, in their allegations in the petition are not even definite or sanguine about this, because their allegations in respect to some of the paper show lack of knowledge in respect thereto, and then the claim made even now under the light of subsequent circumstances is that the paper of the directors who afterwards became insolvent, was merely of doubtful character. Then how must it appear to Mr. Orr at the time when he probably relied upon the officers for the conditions of the bank and when in the absence of anything to the contrary he may have reasonably

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believed that the taking of these notes was the best thing to be done under all the circumstances? In the absence of anything to the contrary the conclusion of the court as to the conduct of Mr. Orr is that but for aught that is contained in the petition, he acted as an ordinarily prudent person under all the circumstances.

To make entirely clear the mind of the court, let it be understood that the conduct of the "interested" directors may not be considered in the same light. The conduct of all those who were directors from the beginning is an open question, and their action in giving and receiving these notes is not conclusive, but is the remaining subject of inquiry in this action. Furthermore, there are necessarily certain predominant facts in this case about which there can be no dispute. A chancellor will eventually have to determine from the paramount facts in the light of the incidental facts and circumstances where the responsibility is. A court of equity must determine and adjust the liabilities, if any, according to the part taken, the duty owing, and the proportionate effect of individual acts of directors, if any, in causing and contributing to the injury. Upon the present demurrers the court is called upon to consider the facts alleged from an entirely different viewpoint from that at any other time in the consideration of the case. In considering the demurrer of J. W. Meek, the predominant thought was concerning the acts in the matter of merging the affairs of the two banks. In passing upon his demurrer it was not essential to consider the questions that are now raised by the present demurrer. At that time the one conspicuous idea was the charge that the new bank in taking over the assets of the old and assuming its liabilities, started out as an insolvent institution. Now, we have clearly presented not only the questions of duty and omission of the subsequent directors, but as well the pertinent question whether the acts of taking notes of certain directors for the losses, the reports of the condition of the bank made by officers and certain directors to the comptroller of the currency, and the declaration of dividends, contributed in part to any material extent or degree in causing the loss to the stockholders.

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The directors who came in after the merger of the old bank which is believed to have been the chief thing done which constituted the primary and efficient cause of the injury to the stockholders can not be held liable therefor, unless it can be shown that their subsequent acts in some way materially contributed to the loss. It is, of course, fundamental that negligence without injury is not actionable. Smith, Hagerty, Dean and David came in after June 1, 1910. Brenholts, Schoedinger, Beggs, Davis and Cole had gone out. Thereafter eight original directors remained for a time, and eight who were not in from the beginning came in, Bowland and Orr having come in prior to June, 1910, continuing until the end. The present demurrants, other than Orr, having come in after June 1, 1910, their acts are to be measured on the same basis as to all matters occurring prior to that date. They can, of course, be charged with nothing which occurred prior to that time. The only complaint made against them is that they failed to restore the losses remaining after the transactions of March and April, 1910, concerning the giving of notes. It is averred as to them also that the losses were readily discoverable and apparent from any proper and reasonable examination of the affairs of the bank, but that the directors remained negligent and inactive and permitted the losses to be carried unrestored. These persons continued directors until the close of the bank. Smith and Hagerty served about eighteen months, while Dean served eleven months, and David about six months. Their duties did not call upon them to make an examination of the books, but they were required merely to use ordinary care in the performance of their duties as directors in obtaining such information as to the condition of the bank as would enable them to intelligently perform their duties in a reasonable supervision of the affairs of the bank. They were justified in acting upon the reports of the officers of the bank, of its loan committees, and particularly upon the acts of the bank examiners and of the comptroller of the currency.

The mind of the court is that sufficient facts are not alleged against these four directors concerning the matter of losses to constitute a cause against them. They can not in any

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manner be charged with the original cause of the loss of the stockholders, but they are in fact only charged with failure to discover them. Up until the last few months of the life of the bank, the old officers and directors remained in office and probably in control. In the absence of a more substantial and reasonable showing, it is pure conjecture as to what these four directors could have done by the exercise of ordinary prudence in the matter of the restoration of losses, even if they were actually aware of them, if any there were.

But the predominant fact is, according to the general theory of the complaint, that the prime cause of the loss claimed is the taking over of the assets of the old bank and the assumption of its debts. Negligence is the gist of the complaint of the liability asserted, and the ordinary rules of law must be applied. According to the allegations of the petition, the complete loss as before stated must have been made effectual at the beginning or in the early history of the bank. The acts of the directors that came in after the loss had actually occurred can not be mulcted in damages if they did not in any wise materially add to or increase the loss complained of. That they did not materially add to the loss is clear in view of all the allegations of the petition. With reference to the claim made that some of these men were during the continuance of the bank as a going concern financially able to make full restoration of the losses that remained after the transaction of March, 1910, it may be observed that bank directors are but ordinary persons and can not accomplish the impossible, but can only do that which ordinary men may accomplish. At least eight of the old directors remained as such for some months after March 30, 1910, and had, as before stated, practical control. The very persons who, according to the petition, had settled with themselves apparently remained in virtual control so that the new directors were helpless even if they had become advised or could have become advised of the losses by the exercise of ordinary prudence. The only way in which any such alleged losses could have been recovered would have been by action at law, but in the face of the allegations the fact remains that it must be presumed that these newer directors were justified in acting upon

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the attitude of the bank examiners and comptroller of the currency. A minority of directors could not have forced either a settlement or a law suit, and if they had undertaken by the ordinary legal processes to have restored the alleged losses, the inevitable result would have been failure of the bank. The claim is made in one place in the petition that if efforts had been made to restore the losses, the bank could have been continued as a going concern, while in another part of the petition it is urged that when the bank was insolvent it ought to have been wound up and dissolved.

We are bound to conclude that the original acts of the original directors must be considered the proximate cause of the injury complained of, and that whatever negligence may be claimed against the present demurrants is so slight, as not to constitute actionable negligence against bank directors, and is so remote as a producing cause as not to be actionable in any event. This will also apply to the subsequent acts concerning the reports to the comptroller of currency and the declaration of dividends.

Now, taking up the matter of complaint concerning the reports to the comptroller of the currency it is to be observed that these reports are made up by the officers and certified by three of the directors. It is not a matter which is brought to the attention of the whole board, so that any alleged neglect in making the same can not be charged against all of them, except as they might become aware of the general result by the ordinary means from published reports, and by inquiry. The officers swear to the reports while the directors merely certify to them, and for this purpose they are not required or expected to examine the books. The petition shows that Orr certified the report of March 29, and September 1, 1910, and of June 7, 1911. Hagerty certified to the one of November 10, 1910; Smith to that of March 11, 1911; Dean to the one of June 7, 1911, and David to the one of September 1, 1911. Each one of the reports certified to an unimpaired capital and the existence of a surplus fund. It is averred that the total loans and discounts shown by each one of the reports contained the notes of Courtright, Stewart, Ellison and Boardman, and other notes given

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by the same persons for money borrowed, and the notes of Beggs & Company assumed by Hamilton, and the notes of C. E. Miles, and bonds of the Ralston Steel Car Company, all of which amounted to a considerable sum of money and that they were considered as the basis of making up the report. It is averred that the reports were known to be untrue by Court-right, Jacobs, Ellison, Stewart, Meek, Orr, Vaughan, and Boardman and by the comptroller of the currency, and that if not known to be untrue reports by Hagerty, Smith, Dean, Graves and David, it was because they did not give to the affairs of said bank due and diligent attention but they were grossly negligent in respect thereto.

This ground of complaint being with reference to a duty prescribed by the National Banking act, charges must be made to conform to the exclusive rule of liability therein prescribed. The rule is that there is no liability, unless the directors knowingly violate the provisions of the banking act, or unless they knowingly permit others to violate the same. This matter has been fully covered in the first opinion. See U. S. Rev. Stat. 5339; *Yates v. Bank*, 206 U. S. 158 [27 Sup. Ct. Rep. 638; 51 L. Ed. 1002].

The averment on its face as against Mr. Orr conforms to the rule above stated, but the same is not true as against Hagerty, Smith, Dean and David, because it is made to rest upon a charge of gross negligence. It is held not good as to them not only because it does not conform to the rule of law above stated but for other reasons hereinafter set forth.

Considering the charges concerning the reports further as to Mr. Orr, it is to be observed that the theory of the complaint is that by circulating printed copies of abstracts of the reports showing the unimpaired capital and the existence of a surplus, it was made to appear to the stockholders that the bank was solvent, whereas it was at all times insolvent "and by such means kept said bank open and doing business when by law it should have been closed up and liquidated," and that during the period covered by the report the losses to said bank continued to increase by the growing insolvency of the debtors thereof, as each and all of the said defendants either knew or

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would have known had they given to the affairs of said bank reasonable attention.

It does not appear that the keeping of the bank open which the reports resulted in doing, materially contributed to the injury to the stockholders, because their rights in the opinion of the court were entirely destroyed by the alleged acts in connection with the merger of the two banks, according to the theory of the petition. The keeping of the bank open did not cause such injury that there was such diminution of the assets that the bank is unable to pay its debts, the allegations being that there are sufficient to do that. The theory of the charge is that by keeping the bank open from March 29, 1910, a period of twenty-one months, the ability to recover from Courtright, Boardman, Ellison and Stewart was lessened. The allegations in this respect are indefinite, leaving the matter open to conjecture and speculation. The notes had been given for a period of five years, and nothing could have been done in the way of collecting the notes until their maturity. Nothing could have been done therefore by way of collecting any losses from the directors, except by an original action ignoring the notes. With the management of the bank virtually under the control of the persons whose conduct is alleged to have been the cause of its ruin, there was little that an individual director or a minority could do in the way of bringing an action. Furthermore, for the twenty-one months covered by these reports, it is to be presumed that the bank examiners examined the affairs of the bank from time to time and made reports to the comptroller of the currency. Otherwise, the bank would not have survived as long as it did. In view of the law and the requirements of the National Banking act and of the duties imposed by it upon the comptroller of currency and his assistants, it is entirely rational to presume that if the affairs of the bank were in such deplorable condition as the petition now makes them to be, the comptroller of the currency would have closed its doors.

It is true that plaintiffs have averred that the comptroller of the currency aided and abetted in the acts of misfeasance complained of, but from the allegations in the petition it can not

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be assumed that that officer deliberately acquiesced in clearly negligent acts, or that he aided and abetted in specific direct violations of the spirit of letter of the banking act. In the first opinion rendered in this case, looking to the question from the right of the plaintiffs to maintain this action, some comment was made by the court concerning the allegations with reference to the comptroller of the currency. Little weight, if any, were given them in deciding the right of the plaintiff to sue. Certainly, they were not considered seriously as the court has been compelled to do at this time. It must be observed that the comptroller of the currency is placed in absolute charge of the affairs of the national bank in so far as they may violate any of the provisions of the national law. The power and discretion of the comptroller is broad and comprehensive, it being within the appropriate scope of his duty to advise with and aid banking officials to tide over difficulties which they may encounter. The comptroller, no doubt, did advise and consent to some of the acts done by the directors with reference to some of the matters touched upon by the plaintiffs, but it is to be presumed that they were believed to have been the best thing to be done to save the bank from ruin. It is to be presumed that that officer and his representatives believed that the giving and receiving of the notes by the directors to make good the impairment of the capital was proper, and that the notes were reasonably good or else the bank would have then liquidated. And it must have been considered by that department that these notes remained good during the period covered by the reports, and that the belief was not changed until the time of closing the bank.

A court of equity in disposing of this case, either finally or now on demurrer, is bound to apply equitable principles in adjusting the liabilities of the different directors. And in the exercise of its judgment, it must consider the measure of prudence to be applied, whether proper care was probably applied, and what the probable effect of particular acts was. While plaintiffs allege that Orr knew the reports to be untrue, the natural presumption from the facts and conditions appearing from the pleadings belie the allegation. He knew these notes

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were part of the assets of the bank; and he, as well as the bank examiners, and other directors, probably did not know that Courtright, Boardman, Stewart, and Ellison, who had, in the absence of allegations to the contrary, as the court may assume, been hitherto of good repute financially, and were not financially bankrupt until about the time the crash came. Applying the rule of ordinary prudence to the charge that by reason of the false reports, the bank was kept open which lessened the chances of recovery from these men, we must apply the rules of common sense and ordinary experience in such matters. We are bound to know how difficult it is to learn of the financial ability of persons until there appears some clear manifestation. If it was so apparent for such a length of period of time as claimed by the plaintiff that these men were in such financial condition and not fit persons to be officers and directors of the bank, why, it may be inquired, should the stockholders have continued to elect them during that period, if it was a matter of common knowledge?

We must not expect or exact impossible or improbable things. It is easy, after the crash, to say that these men knew these things, but the rule is, like the man who killed another in self-defense, how did it appear to him under the conditions and circumstances at the time?

As a matter of equity, looking to the part taken by Mr. Orr, in reference to the notes and reports, it is not possible to arrive at any tangible basis for holding him responsible for the losses in view of the fact that they must have occurred earlier than his service according to the allegations of the petition, and because any acts committed by him were not a material producing cause in contribution thereto.

The claims made seem rather remarkable.

Here was a bank which took over assets and assumed debts, with \$750,000 fresh capital, all paid in, and still is started out as an insolvent. It took over so much worthless assets that it was totally insolvent from the time it began until March 30, 1910, at which time the losses are said to be more than a million. It had gone for a period of five years with so many worthless assets that it was insolvent, the losses totalling a million, and

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still it passed muster with the comptroller of the currency who had evidently not discovered its insolvency, else it could have been closed. But the comptroller comes in on the transaction of repairing the losses in March, 1910, he being called in to assist in fixing up the affairs of the bank. At that time "in order to keep said bank open, which was the purpose of said defendants, and said comptroller, and because said defendants and said comptroller could not furnish nor devise means to fully restore said bank's financial condition, and to make what was to be done, and was done, seem more reasonable and plausible" etc. Then for twenty-one months after this, the bank still passed muster with the government until it was closed, and it now has enough assets to pay its debts. All this tends to demonstrate one thing, viz: the varying character of opinion of concerning the value of credit. In the face of the claims of insolvency, of worthless assets, of misconduct of the comptroller of currency, etc., the total loss today is the amount of stock, \$750,000, if the allegations of the petition are to be relied upon, unless we are to speculate on what might have been made for the stockholders which can not be done and during all the life of the bank the stockholders received dividends upon their stock.

These last statements are made because it reflects upon the use of ordinary prudence and judgment of bank directors in passing upon the value of paper.

This is the one problem in this case. What were the assets of the old bank reasonably worth at the time they were taken over?

If the directors used ordinary care in passing judgment on the paper, then there is nothing in this case.

If they failed to observe ordinary care at that time, that then is the proximate cause of the loss to the stockholders.

As already stated, it was entirely proper, under the law, for the comptroller of the currency to give advice and succor to the bank in order to enable it to pull through their difficulties, if possible, and the facts generally stated in the petition fail to support the aspersions cast by the pleadings upon his motive. It was done for either of two purposes, viz., either to secure the right or the support of the right of the stockholders to bring

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this action or to get away from the presumptions which, of necessity, must arise from the examination of the bank made by the officers under the comptroller and upon which the directors, other than the president and cashier of the bank, had the right to rely. It may be observed that this matter was given little weight in the original opinion touching the question of the right of plaintiffs to maintain this action, their right being grounded upon stronger reasons. Directors of banks can not begin to learn and know as much as bank examiners and its officers, and managers, know of its affairs. They have the right to rely upon both until something occurs to arouse suspicion. Bank directors, of course, are not figureheads, and reasonable prudence requires them to call for information continuously about the credit of the bank. But the loan committee are to be relied upon in the first instance. It is not disclosed, however, how the matter of passing upon the value of the assets of the old bank was done, and the presumption, therefore, must be that each and all of the directors assumed the responsibility in the beginning.

Some remarks of the court in the case of *Easton v. Iowa*, *supra*, materially reflect upon the matter of insolvency of a bank, and the duty and discretion of the comptroller of the currency. A statute has been passed, making it the duty of the officers of the bank when they know it is insolvent to at once suspend its active operations, making it a criminal act for failure so to do. The court held such act unconstitutional, and at one place stated the following:

"Whether a bank is or is not actually insolvent may be, often, a question hard to answer. There may be good reasons to believe, that, though temporarily embarrassed, the bank's affairs may take a fortunate turn. Some of the assets that can not at once be converted into money may be of a character to justify the expectation that, if actual and open insolvency be avoided, they may be ultimately collectible, and thus the ruin of the bank and its creditors be prevented. *McDonald v. Bank*, 174 U. S. 610 [19 Sup. Ct. Rep. 787; 43 L. Ed. 1106]. But, under the state statute, no such conservative action can be followed by the officers of the bank except at the risk of penalties

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of fine and imprisonment. In such a case the provisions of the federal statute would permit the comptroller to withhold closing the bank, and to give an opportunity to escape final insolvency. It would seem that such an exercise of discretion on the part of the comptroller would, in many cases, be better for all concerned than the unyielding course of action prescribed by the state law. However, it is not our province to vindicate the policy of the federal statute, but to declare that it can not be overridden by the policy of the state."

In respect to the dividends which are alleged to have been declared without sufficient examination or without ordering any examination, it is the opinion of the court that they did not materially contribute to the injury complained of, and that none of the present demurrants are in any wise affected thereby.

With reference to the averment that one dividend was declared upon advice with the comptroller of the currency, it is to be presumed that that officer acted in good faith and upon reasonable ground in the absence of a clear showing to the contrary. The stockholders received the dividend, and the only complaint that can be made is that a wrongful declaration of dividends tended to prolong the life of the bank. No greater injury could have been caused by these acts than by the reports to the comptroller.

The averment as to the abstraction of certain pages of the general journal whereon the transactions of March 30, 1910, should be regularly entered, is that this was done for the purpose of preventing the stockholders from knowing or learning the facts concerning them; that it was done to conceal the sources and methods from any by which said banks' financial affairs had been tampered with and to conceal the true financial condition of the bank. It is said that the comptroller of the currency advised the abstraction. If he did, it is to be presumed that he had reasonable ground for advising some action concerning it. The effect of such allegations is rather to reflect on the motive supposed by the pleader to have prompted the directors in the charging off of assets and in the taking of the notes of the directors. The matters are said to relate to the attempt by the eight directors to release themselves. If it was

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in relation to an alleged release of the directors, the comptroller would be justified in giving such advice. At any rate the matters concerning the alleged abstraction of the pages of the journal being evidential of motive, rather than of operative fact, for a pleading, do not add to the general facts which go to the matter of charging off of assets, and the giving of notes to repair the same. These transactions have been considered in their effect upon the liability of the present demurrants, and we do not see how the last mentioned matter changes the situation, and the letter written by the comptroller to the board of directors in which it was stated that the capital of the bank and its surplus was unimpaired, which was spread upon the minutes, is alleged to have been for the purpose of maintaining the confidence of the stockholders and the customers of the bank. It is charged that this letter was written, "pursuant to influence unknown to plaintiffs." It was no doubt written to inspire confidence and it should rather be assumed that the comptroller did it upon facts submitted, believing it to have been reasonably justified. But in all events we come back to the proposition that in whatsoever light these matters are to be considered, it does not appear that the prolonged continuance of the bank in operation, materially added or contributed to the primary and paramount cause of the loss.

The conclusion is that the proximate and efficient cause of injury to the stockholders were the acts of taking over the assets of the old bank, and the assumption of its debts, the decision now being that each and all of the present demurrers are sustained, and the several defendants are discharged from the case.

The pleadings of plaintiffs should be amended.

If there is a desire to present an amended petition affecting further the present demurrants, it would only be considered on leave, upon a proposed pleading presented for consideration. If there be no such desire, the pleading is ordered amended to conform to this decision by omitting these defendants, and by the omission of all reference to the matters covered herein as to any defendants for the reasons stated in this opinion.

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The entry may be prepared accordingly, saving exceptions, to which error may be prosecuted, if desired, before final hearing, as to the other defendants. Any amendments may be submitted to the court on April 14 as to the present demurrers on motion for leave to file. The other amendment as to the old directors should be filed April 5 and answered by the defendants by April 12. Any proposed amendment as against the present demurrants may be put in the form of an amendment to the original petition.

ATTORNEYS—PARTITION.

[Licking Common Pleas, April Term, 1912.]

***GEORGE RICHARDS ET AL. V. HOWELL RICHARDS ET AL.**

1. **Counsel Fees Regularly Allowed in Partition may be Divided so as to Include Counsel Other Than for Petitioner.**

Attorneys other than for the petitioner in a suit for partition, who perform services that are of benefit to the parties in interest and assist in the determination of the case, are entitled to share in the fee regularly allowed to counsel for the petitioner, but are not entitled to an extra counsel fee on account of such services.

2. **Counsel Bringing in Wives and Husbands of Tenants in Common in Partition Suit not Entitled to Share in Compensation.**

The wives and husbands of tenants in common are not necessary parties to a suit for partition; hence, attorneys whose services consisted in bringing into the case the wives and husbands of the tenants in common in the lands sought to be partitioned are not entitled to share in the counsel fee to be awarded in the case. *Weaver v. Gregg*, 6 Ohio St. 547, and *Mandel v. McClave*, 46 Ohio St. 407, distinguished.

[Syllabus approved by the court.]

EXCEPTIONS to motion to allow counsel fees.

Kibler & Kibler, for plaintiffs.

Fitzgibbon & Montgomery, for defendants.

WICKHAM, J. (Orally.)

On January 26, 1912, the plaintiffs, George Richards and Alice Brooks, filed their petition against Howell Richards et al.,

*Affirmed, no op., *Richards v. Richards*, 58 Bull. 116.

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for the partition of certain lands owned by the plaintiffs and the defendants, who were tenants in common.

The plaintiffs and the defendants, with possibly one exception, were married men and women. The husbands and wives of the tenants in common were not made parties to the suit. Afterwards, on March 8, 1912, one of the defendants, Charles Richards, filed an answer and cross petition in the case, and in his cross petition he sets out the facts that the plaintiffs and defendants were married, and sets out the names of the husbands and wives of the tenants in common. He prayed that the husbands and wives be made parties to the partition suit, which was done. The cause then proceeded by due course to the decree in partition. Commissioners were appointed, who reported that the lands could not be divided by metes and bounds, and returned an appraisalment. The land was sold by order of the court; the report of the commissioners was confirmed and the deed and distribution was ordered, and a counsel fee was allowed by the court in the case.

Kibler & Kibler, representing the cross petitioner, moved the court for an allowance to them of a part of the counsel fees in the case.

If the husbands and wives of the tenants in common were necessary parties, the services of Kibler & Kibler were of value and of benefit to the parties to the suit, and under the rule as we understand it they would be entitled to a portion of the counsel fee allowed by the court in the case.

It has been the practice, so far as we understand it, in partition cases, where counsel other than those who file the petition perform services which have resulted in a benefit to the parties, and have assisted in the prosecution of the case and in carrying it through to the final determination, to award to them, not an extra counsel fee in the case, but a part of the counsel fee allowed to counsel in the case by the court. In other words, they share, not equally always, but share with counsel for the plaintiff in a division of the counsel fees.

We think there can be no doubt about that being the rule, and so we think there is but a single question involved in this

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case, and that is whether the husbands and wives of the tenants in common were necessary parties.

It follows that if they were not necessary parties, all that was done by Kibler & Kibler in bringing them into the case did not result in any benefit to the parties in the case, and therefore their services would not be of value, and they would not be entitled to a part of the counsel fee.

It was held by the Supreme Court of this state in *Weaver v. Gregg*, 6 Ohio St. 547 [67 Am. Dec. 355], that the husband or wife of a tenant in common in a partition suit was not a necessary party. In that case George Weaver was the owner of an undivided one-fourth of certain lands in Pickaway county. He and his wife were married in 1819, and were husband and wife in 1840. In that year a partition suit was brought to partition the lands in which George Weaver owned an undivided one-fourth. His wife was not made a party defendant. The lands were sold in the partition proceedings. In 1848 George Weaver died, and thereupon his wife brought an action against the purchaser of the land for the assignment of dower, claiming that she was not a party to the partition suit in 1840, and that the decree of partition did not extinguish her dower; that she was still entitled to dower, and that upon the death of her husband her dower became consummate, and that she was entitled to a life estate in one-third of his land. The Supreme Court held that she was not entitled to dower; that she was not a necessary party in the partition suit, and that by the sale of the lands in partition her dower was extinguished. That has been recognized, I think, as the law since the decision of that case.

We are cited to a recent decision of the circuit court of this circuit, in the case entitled *Hand v. Kibler*, 34 O. C. C. 95 (15 N. S. 360), and it is claimed by Kibler & Kibler that the court decided that the wife was entitled to the value of her inchoate right of dower on the distribution of the proceeds of the sale of land in a partition case.

The circuit court in their opinion said that the decision in the case of *Weaver v. Gregg*, *supra*, was in conflict with the later decision of our Supreme Court in the case of *Mandel v. McClave*,

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46 Ohio St. 407 [22 N. E. Rep. 290; 5 L. R. A. 519; 15 Am. St. Rep. 627].

The applicant for a part of the proceeds to be distributed in the case of *Hand v. Kibler supra*, was the divorced wife of the tenant in common. The circuit court held that she was entitled in the distribution of proceeds to the present value of her inchoate right of dower.

We are unable to agree with the circuit court that the decision of the Supreme Court in *Mandel v. McClave* conflicts with the decision of the court in the case of *Weaver v. Gregg*.

In *Mandel v. McClave* the question was different. There the question was whether the wife was entitled to the value of her dower as against the creditors of her husband. Mandel and his wife had executed two separate mortgages upon their interest in the land owned by him. A suit was brought to foreclose the mortgages. In the meantime judgment had been rendered against Mandel in favor of other creditors, and those judgments were liens upon the land. The land was sold in the foreclosure proceedings, and it came to the distribution of the proceeds. Mrs. Mandel made an application to the court for an allowance to her out of the proceeds of a sum of money representing the present value of her inchoate right of dower as against the claims of the judgment creditors, and the court held that she was entitled to the present value of her inchoate right of dower in the whole premises, or rather the whole value of the land, as between her and the judgment creditors of her husband. They regarded her in the character of a surety and her husband as that of the principal debtor. They say (page 414) :

“As between each other he would be the principal and she his surety. We think the same principle should be applied to her contingent right of dower.”

The court held that by signing mortgages releasing her dower it inured only to the benefit of the mortgagees, and did not inure to the benefit of the subsequent judgment creditors. There being sufficient funds to satisfy the mortgages, but not sufficient to pay the other judgments which were liens, that as between those judgment creditors and Mrs. Mandel she was entitled to

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the value of her inchoate right of dower out of the entire proceeds, and they awarded it to her.

In that case the court call attention to other decisions of the Supreme Court, among the rest *Kling v. Ballentine*, 40 Ohio St. 391. In speaking of the case of *Kling v. Ballentine*, the court say:

"In that case the contest was between the widow and certain devisees, who were daughters of the husband. The widow had, during her husband's life, joined with him in a mortgage of his lands to secure his debt, and the court held, as against the husband's devisees, who were his daughters, the widow was entitled to dower in the whole of the lands, to be paid out of the surplus after the mortgage debt had been paid, thus exhausting the husband's interest before resorting to the wife's dower. In that case the devisees were entitled to all the interest of the husband, their devisor, as in the case at bar the judgment creditors were entitled to all the interest of their debtor in the fund, and the principles that underlie and justify the holding of the court in that case, are the same which we apply to the case before us; they are, that the contingent interest of the wife to dower in her husband's real estate is valuable, and that her release of it by joining with him in a mortgage to secure his debt, is not a technical bar, and inures only to the mortgagee and those claiming under him."

The circuit court of this circuit in the *Hand-Kibler* case say that the case of *Weaver v. Gregg* and *Mandel v. McClave* are in conflict. But, as said in *Mandel v. McClave*, *Kling v. Ballentine*, and other cases cited, the question was not between the husband and wife, but between the wife and creditors of the husband.

We find in another circuit court decision of this state where the court cites the case of *Weaver v. Gregg* approving it, and quotes the language of the court in their opinion. The decision of that circuit court was rendered after the case of *Mandel v. McClave* was decided, so it appears that the circuit court which decided that case did not understand that *Mandel v. McClave* overruled *Weaver v. Gregg*, or was in conflict with it. *Mandel v. McClave* was decided in 1889, and the case I speak of, *Gillett*

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v. *Miller*, 5 Circ. Dec. 588 (12 R. 209), was decided in 1895. On page 590 Judge Day, who rendered the opinion, cites the case of *Weaver v. Gregg* and quotes part of the opinion. In that case the question was substantially the same as that in the case of *Mandel v. McClave*, and the court held in line with *Mandel v. McClave*, that the wife, as between herself and the creditors of her husband, was entitled to the present value of her inchoate right of dower in the whole lands owned by him.

In the case before us now, there is no question of the rights of creditors, and so far as it appears from the record no creditors had liens upon the land. It is the simple question whether, in the partition of lands among tenants in common, their spouses are necessary parties. That depends upon and is determined by the solution of the question whether the husband or wife, as between the tenant in common and his spouse, is entitled to receive the present value of his inchoate right of dower upon the distribution of the funds arising from the sale of the common estate.

It has been held by one of the nisi prius courts of this state that in a partition suit the wife is a necessary party, and that she is entitled to a distributive share of the proceeds of the sale of the land; that is, she is entitled to the value of her inchoate right of dower. In another nisi prius decision it is held the other way. The common pleas court of Franklin county, on an application made by the wife, whose husband was a party to the suit and a tenant in common in the land, decreed and ordered the value of her inchoate dower in his interest to be distributed to her. In another nisi prius court in Delaware county, the wife was the owner of the real estate, and her husband had abandoned her. They were living separate and apart, although they were husband and wife. The husband came in and asked to be made a party, which was done. He filed an application and asked the court to pay over to him the present value of his inchoate dower in his wife's interest in the land. The court refused to do so and ordered the whole amount to be paid to the wife.

I can see a distinction in the case before us now and the *Hand* case cited by counsel, which I understand is now pending in the Supreme Court. It seems to me that it was unnecessary

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for the circuit court to say in their opinion that the case of *Weaver v. Gregg* and *Mandel v. McClave* are in conflict. The distinction is this: in the *Hand* case the wife had been divorced from her husband for the husband's aggressions. By force of the statute she retained her dower interest in his land of which he was seized at the time the decree of divorce was granted. If she had not received the value of her inchoate dower from the sale of his land in partition on the distribution of the proceeds, she would lose her interest in that part of his estate. Or, in other words, if the purchaser of the land in that suit took the real estate free and divested of her dower interest, and the whole of the funds was distributed to the husband, she would have no lands in which to claim dower in the event of his prior decease, nor could she on his death claim an interest in his personal estate.

It is to be presumed that in the decision of a divorce case the court protects the interests of the wife in the personal estate of her husband by an allowance of alimony. There is no provision of law for a divorced wife to share in the personal estate of a deceased former husband. The law is that the divorced wife does not take dower in after-acquired real estate of her husband. It is only by force of the statute that she retains her dower in the real estate of which he was seized at the time of the decree of divorce, or any time during coverture, if she has not released her dower. If the husband invests the funds arising from the sale of his interest in land in other real estate, his wife's dower right immediately attaches. If he does not invest it in real estate, it is personal property, and if he dies seized of personal property his wife is entitled, under the law, to her share in his personal estate. But if a decree of divorce has been granted these results do not obtain in favor of the divorced wife.

So it seems to me that there could be a good ground for a distinction in a case where a man and woman are husband and wife, and in a case where that relation has been extinguished by a decree of divorce.

It has been the practice, almost or quite universal in this state, that where lands are sold in partition cases in which a husband or wife is a tenant in common, upon a distribution of the proceeds of the sale of the land, the share of the fund is

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distributed to the owner of the interest in the land, the tenant in common. It has never been the practice to divide the share, and distribute a part to the tenant in common and a part to the husband or wife, as the case may be, as the present value of the inchoate dower.

There is no more reason for that than there would be to distribute a part of a judgment paid by a landowner, whose lands have been taken for public use under the law of eminent domain. In the exercise of the right of eminent domain, land may be taken for public use. The value is fixed by a jury, judgment is rendered in favor of the landowner, and the amount or value of the land is paid to him. But so far as I know I have never heard of a division being made between husband and wife in the distribution of that fund. So it would be the same where the husband owns land and dedicates it to public use. The dower right of the wife becomes extinguished. It would hardly be claimed that where a husband, if he owns land and dedicates it to public use, and afterwards dies, that his wife has a dower interest in it; or if it be appropriated in a writ brought for that purpose, and the value be found and the money paid to the husband, that the wife would be entitled to afterwards claim dower in that same land, on the ground that she was not made a party defendant in the appropriation case.

We might say further that there is no provision of the statutes for paying to the wife the value of her inchoate dower. The section of the statutes which provides for distribution in partition cases is Gen. Code 12039. That section reads:

“The money or securities arising from a sale of, or an election to take the estate, shall be distributed and paid, by order of the court, to the parties entitled thereto, in lieu of their respective parts and proportions of the estate, according to their rights herein.”

That means an aliquot part or proportion—the part or proportion which is owned by the tenant in common, and does not and can not be construed to mean an interest undetermined, which may never become consummate, like the inchoate right of the wife's dower.

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The Supreme Court of Indiana, it seems, understands from a consideration of the cases decided by the Supreme Court of Ohio, that *Weaver v. Gregg* is still the law. In the case of *Haggerty v. Wagner*, 148 Ind. 625 [48 N. E. Rep. 366; 39 L. R. A. 384], it is said, in opinion:

"In *Weaver v. Gregg*, *supra*, it is held in a very able opinion by Brinkerhoff, Judge, speaking for the whole court, that a partition sale and deed without making the wife of a cotenant a party, extinguishes her inchoate right of dower, under statutes similar to our own, and passes the entire estate to the purchaser. Appellee's learned counsel contend that the case just cited has been overruled by the Supreme Court of Ohio in the following cases: *Black v. Kuhlman*, 30 Ohio St. 196; *Unger v. Leiter*, 32 Ohio St. 210; *Dingman v. Dingman*, 39 Ohio St. 17; *Mandel v. McClave*, 46 Ohio St. 407. We have examined these cases and find they do not even touch the subject, much less do they overrule the doctrine laid down in *Weaver v. Gregg*, that a partition sale extinguishes the inchoate right of dower of the wife of one of the cotenants, without making her a party."

We hold that the wife of a tenant in common is not a necessary party in a partition suit. As between husband and wife our Supreme Court never yet has gone to the extent of holding that she is a necessary party and entitled to share in the fund arising from the sale of the land. It is not necessary to do so to protect her interests.

We overrule the motion of Kibler & Kibler for an allowance of a portion of the attorney fees in the case. Exceptions are noted.

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BUILDINGS—MUNICIPAL CORPORATIONS.

[Hamilton Common Pleas, April 25, 1912.]

HOWARD M. LEY ET AL. v. DENIS F. CASH ET AL.

1. Material Used and Methods of Construction not Projected Use Determining Factors in Issuing Building Permit.

The powers conferred on municipalities by Gen. Code 3636, relative to control of the erection and repair of buildings, are limited to regulations as to the material used and plans and methods of construction as distinguished from the projected use thereof; hence, an application for permit to erect a building of lawful character, and not in itself a nuisance, should not be refused or a permit granted be revoked, because a prohibited use is anticipated or contemplated.

2. Revocation of Building Permit for Lawful Structure Because Projected Use is Unlawful is Enjoinable.

Injunction lies to restrain a municipal building commissioner from revoking a permit to erect a lawful structure, not in itself a nuisance but because the use contemplated would be in violation of an ordinance, such restraint being neither an interference with the discretionary powers of the building commissioner nor an obstruction with a criminal prosecution for violation of the municipal building code.

[Syllabus approved by the court.]

MOTION to dissolve injunction.

David Davis and *Frank E. Wood*, for plaintiffs:

Power to enact ordinance prohibiting erection of certain buildings in certain localities. *Ravenna v. Pennsylvania Co.* 45 Ohio St. 118 [12 N. E. Rep. 445]; *Bloom v. Xenia*, 32 Ohio St. 465; *Minturn v. Larue*, 64 U. S. (23 How.) 435 [16 L. Ed. 574]; *Culver v. Ragan*, 8 Circ. Dec. 125 (15 R. 228).

Constitutionality of such ordinance. *St. Louis v. Russell*, 116 Mo. 248 [22 S. W. Rep. 470; 20 L. R. A. 721]; *Yick Wo v. Hopkins*, 118 U. S. 356 [6 Sup. Ct. Rep. 1064; 30 L. Ed. 220]; *Richmond v. Dudley*, 129 Ind. 112 [28 N. E. Rep. 312; 13 L. R. A. 587; 28 Am. St. Rep. 180]; *Quong Woo, In re*, 13 Fed. Rep. 229; *Cing Lee, Ex parte*, 96 Cal. 354 [31 Pac. Rep. 245; 24 L. R. A. 195; 31 Am. St. Rep. 218]; 28 Cyc. 768; *State v. Garver*, 66 Ohio St. 555 [64 N. E. Rep. 573]; *State v. Yates*, 66 Ohio St. 546

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[64 N. E. Rep. 570]; *Gordon v. State*, 46 Ohio St. 629, citing, *Brook v. Hyde*, 37 Cal. 375; *Fruend*, Pol. Pow. Secs. 142, 144.

Equity will interfere with executive authorities to enjoin enforcement of illegal ordinance. *Cavanaugh v. Cleveland*, 8 Dec. 329 (6 N. P. 423); *Ryan v. Jacob*, 8 Dec. Re. 167 (6 Bull. 139); *Spiegel v. Gansberg*, 44 Ind. 418; *State v. Cunningham*, 81 Wis. 440 [51 N. W. Rep. 724; 14 L. R. A. 561]; *Board of Liquidation of Louisiana v. McComb*, 92 U. S. 531 [23 L. Ed. 623]; *Harper's Appeal*, 109 Pa. St. 9 [1 Atl. Rep. 791]; *Old Colony Trust Co. v. Wichita*, 123 Fed. Rep. 763; *Cape May & S. L. Ry. v. Cape May*, 35 N. J. Eq. 421; *Greenwich Ins. Co. v. Carroll*, 125 Fed. Rep. 121; *Cicero Lumber Co. v. Cicero*, 76 Ill. 9 [51 N. E. Rep. 758; 42 L. R. A. 696; 68 Am. St. Rep. 155]; 22 Cyc. 884, 891.

Alfred Bettman and *J. W. Weinig*, city solicitors, *Heilker & Heilker*, and *Robertson & Buchwalter*, for defendants.

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Plaintiffs allege that they are the owners of a leasehold with privilege of purchase in certain lots in the city of Cincinnati; that in December, 1911, they applied for and obtained a permit from the commissioner of buildings of said city to erect a "one-story factory building" upon said lots, were proceeding to erect said building, and have incurred expenses for labor and material therefor; that said commissioner and the director of public service threaten and are about to revoke said permit, to the irreparable loss of plaintiffs; wherefore they ask that defendants be restrained from revoking said permit. A temporary injunction was granted, and defendants now move for the dissolution of such injunction.

The evidence heard thereon discloses that the building commissioner is about to revoke said permit under Sec. 347 of the codified ordinances of Cincinnati, claiming that the building which plaintiffs are about to construct is to be used as a blacksmith shop, in violation of Sec. 452 of such codified ordinances, which provide that:

"No * * * blacksmith shop * * * shall be erected in any block or residence square, in which said block or residence

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square two-thirds (2-3) of the buildings thereon are used for residence purposes, without the written consent of the owners of two-thirds (2-3) of all the property in such block or square improved or used for residence purposes, that the property of such person, company or corporation may be used for any of the purposes above mentioned; said consent shall be filed with the commissioner of buildings."

Section 576 makes a violation of any of the provisions of the title of which Sec. 452 is a part, a misdemeanor punishable by fine.

The evidence shows that plaintiffs intend to use the building under construction for the purpose, not of casting or forging structural iron, but for the purpose of handling such iron, by preparing it for use, boring it for riveting and riveting it, and for the purpose of shaping and putting together architectural iron work. Riveting, boring, cutting and shaping machines operated by compressed air are expected to be used; also a gas furnace for the purpose of heating rivets which are expected to be headed by pressure and not by concussion. Only one forge is expected to be used, and that only for repairing and sharpening tools. Plaintiffs' evidence is that the work to be done in the establishment is not such as can be called "blacksmith work," either in the method of work or in the incidents thereto; such as noise, smoke and dirt, all of which under modern methods are claimed to be practically eliminated.

Defendants' evidence is to some extent to the contrary, and that although the modern methods used will to a large extent eliminate smoke, noise and dirt, yet such work is such as is done to a less extent in a blacksmith shop.

Section 452 of the building code was passed by the council of the city of Cincinnati and not by a village council, and not so many years ago that it should be considered as applicable only to such a blacksmith shop as is and can be found in almost every country village. In the interpretation of such ordinance the evils intended to be cured must be considered. Can the court reasonably assume the realization of plaintiffs' expectation that the result of their intended use of modern methods will eliminate all the objectionable features of a blacksmith shop in a residence

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district, which features must be assumed to have been found by council to be detrimental to such residence neighborhood. If the interpretation of the ordinance in that respect was the only question in this case, the injunction asked for by the plaintiffs should be refused.

The prohibition as to the erection of a blacksmith shop under the conditions as to consent of a certain percentage of the owners of certain property, is a provision of an ordinance of a city and not of the statutes of the state. The power of the city to pass such ordinance must be found in the statutes, and the exercise of such power must not be unreasonable under existing and probable conditions.

The power of council to adopt the ordinance of which Sec. 452 is a part, is claimed under Gen. Code 3636 and 3650.

Under Gen. Code 3636, council has power "to regulate the erection of buildings and the sanitary condition thereof, the repair of, alteration in and addition to buildings, * * * to provide for the construction, erection and placing of elevators, stairways and fire escapes in and upon buildings.

For the purposes of this case it may be conceded that Gen. Code 3636 confers upon council the power to adopt the elaborate provisions of the building code, of which Sec. 452 is a part, except that Sec. 452 prohibits the erection, not by reason of the material used or methods of construction, but by reason of the intended use of the structure. Manifestly, the use is not within the scope of Gen. Code 3636, except as such use would determine the character of material and methods of construction.

Gen. Code 3639 confers power upon council, "to regulate by ordinance, the use, control, repair and maintenance of buildings used for human occupancy or habitation, the number of occupants, and the mode and manner of occupancy, for the purpose of insuring the healthful, safe and sanitary environment of the occupants thereof, to compel the owners of such buildings to alter, reconstruct or modify them, or any room, store, compartment or part thereof, for the purpose of insuring the healthful, safe and sanitary environment of the occupants thereof, and to prohibit the use and occupancy of such building or buildings

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until such rules, regulations and provisions have been complied with."

Such regulation as to "use" is by the terms of the section confined to "insuring the healthful, safe and sanitary environment of the occupants of the building."

Council under Gen. Code 3646, and the board of health under Gen. Code 4413, have power sufficiently large to regulate use for the public health, but such powers are not now under consideration.

Gen. Code 3650, prior to the amendment of March 28, 1911, 102 O. L. 62, conferred upon council power "to prevent injury and annoyance from anything dangerous, offensive or unwholesome." By the amendment it has power to "cause any nuisance to be abated, * * * to prevent injury and annoyance from the same." * * * Manifestly, the power of council to pass the prohibitory ordinance under consideration can be ascribed only to Gen. Code 3650, and then only if a blacksmith shop is a nuisance, and for the purpose of preventing injury and annoyance therefrom.

Assuming that council has so found, and assuming that such finding is a reasonable finding, it might be noted that a blacksmith shop would be as much of a nuisance and annoyance for residents immediately adjoining it as to others more distant. Council has seen fit to prohibit the erection of such blacksmith shop, not where the owners of adjoining residences or all the owners in the block fail to consent, but only where two-thirds of the owners fail to consent. The one-third not so consenting may be the owners of residence property immediately adjoining the proposed shop. It might be further noted that a blacksmith shop established in a building already constructed, would be as much of a nuisance as a blacksmith shop established in a building constructed for that purpose.

Council, however, for the purpose of abating any nuisance and preventing injury and annoyance therefrom, has power to regulate the use of buildings or structures, but such power does not include any power to prohibit the erection of a structure lawful in construction and not in itself a nuisance.

The term to "erect a blacksmith shop" in view of such

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power and its limitation might be applicable to the putting in place, and erection of the appliances used in blacksmith work; i. e., the use of the building rather than the erection of the building in which such work is done.

An ordinance, if possible, is to be given a valid construction. Imperfection in legislation is to be expected. An ordinance which only partially accomplishes a lawful purpose is not invalid, if what is accomplished is within a lawful power. The presumption of a valid legislative intent sometimes necessitates the disregard of the ordinary and technical significance of words.

Assuming that the section can be given a valid construction, the enforcement of the penal conditions of Sec. 576 would, to some extent at least, protect a residence block from the establishment and operation of any blacksmith shop not already established and in operation, without either the building commissioner being permitted to exceed his powers, or the court being compelled to speculate as to whether a building about to be constructed in full accordance with the building regulations as to material and method of construction, is to be used in violation of law.

The plaintiff applied for a permit to build a factory—a lawful structure under the ordinance. If the building contemplated is in plan, material and manner of construction, considered in connection with the declared purpose to which it is to be put, in accordance with the law, the duty of the building inspector to issue the permit is mandatory and ministerial. If in the course of construction, the law is violated, such permit undoubtedly can be revoked, but the building commissioner has no right to assume that the law will be violated in the subsequent use of a lawful structure. A permit to build is in no sense a permit to use. Use is an incident to ownership, subject, however, to lawful regulations.

Courts of equity, when their powers are properly invoked, enjoin contemplated acts, when, after judicial investigation, such contemplated acts are found to be a nuisance, notwithstanding the commission of said acts is made a criminal offense, *State v. Hobart*, 11 Dec. 166 (8 N. P. 246); but an executive or adminis-

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trative officer in the performance of a ministerial act, mandatory under certain structural conditions, has no right to attach other conditions or to assume, or find, that the law is to be thereafter violated in the use to which the structure may be put, and thereby interfere with the enjoyment of substantial property rights. If the required conditions exist, the building commissioner has no discretion in the issue of a permit. If, after the building is constructed, it is used unlawfully or is about to be used unlawfully, there are adequate remedies for the prevention of such use or continued use.

It is claimed in this case that for the court to enjoin the building commissioner from revoking his permit already issued, would be contrary to the principles laid down in *Predigested Food Co. v. McNeal*, 4 Dec. 356 (1 N. P. 266); *Clifton Springs Distil. Co. v. Brown*, 19 Dec. 661 (8 N. P. N. S. 105), and similar cases.

Such cases are inapplicable to the present case for the reason that to enjoin would not be an interference with any discretionary powers of the building commissioner, nor any direct interference with a criminal prosecution of the plaintiffs for the violation of the ordinance, as a valid ordinance. It is true that if the commissioner is enjoined from revoking the permit, the plaintiffs can not be prosecuted for building without a permit, but such interference is a mere incident, in no way precluding the plaintiffs from being prosecuted for any violation of the ordinance under consideration in the use of the structure if they attempt to so violate it.

To construe the ordinance as prohibiting the erection of a building lawful in structure and material and not in itself a nuisance, would be to declare it invalid, but it is not necessary to so construe it. It can be construed as prohibiting a specific use, and therefore for the purposes of this case may be assumed to be valid. So construed, the building commissioner has neither a right to refuse a permit to build such lawful structure, nor a right to revoke a permit to build already given, simply because a prohibited use of such structure is anticipated or contemplated.

The motion to dissolve the injunction is therefore overruled.

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ACTIONS—BOND—OFFICE AND OFFICERS.

[Hamilton Common Pleas, December, 1911.]

STATE EX REL. STRUBLE ET AL. V. HOWARD FERRIS ET AL.

1. Action Against Probate Judge for Deficit in Official Moneys Subject to Ten Years' Limitation.

An action against a probate judge and his successors in office to recover certain public moneys, received by him in his official capacity, which he has failed "to pay over" as provided by his bond given under Gen. Code 1581, is an action on his bond, and subject to the ten years' limitation prescribed by Gen. Code 11226 notwithstanding his bondsmen are not joined as parties to the action.

2. Liability of Probate Judge not Extinguished by Successive Terms.

The liability of a probate judge for a deficit in the public funds of his office, deposited in good faith in a bank and entered in his court books as cash assets, is not avoided by the expiration of one or more terms of office to which he was, subsequent to such bank's failure, elected; but the liability is continuous, there being no severance of his relationship to the probate court and of his control over its books and its funds.

3. Successors in Office Acquiescing in Deficit in Office Funds Precluded From Denying Liability Therefor.

Probate judges, fully cognizant of a deficit in the funds of the court, continuing to carry as cash on the books of the court a deficit carried as cash by a former probate judge, will be deemed to have acquiesced in the fictitious account to which they succeeded and to have voluntarily assumed responsibility for the purported cash on hand, thereby precluding them from denying liability therefor in an action brought against the former probate judge and themselves as successors to recover the amount of such unpaid balance.

[Syllabus approved by the court.]

Pogue, Campbell & Groom, for plaintiffs.*Healy, Ferris & McAvoy*, for Howard Ferris.*Frank F. Dinsmore*, for Kate B. Nippert.*Charles F. Malsbary*, Pro se.

O'CONNELL, J.

This is an action brought by the commissioners of Hamilton county, Ohio, against Howard Ferris, Kate B. Nippert and Charles F. Malsbary.

The petition recites that Howard Ferris, Carl L. Nippert and C. F. Malsbary were probate judges of Hamilton county,

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Ohio. It names the terms during which each held office and says that each duly gave bond in accordance with R. S. 529 (Gen. Code 1581), for each of their respective terms. Each bond stipulates among other things: "Now if the said—shall faithfully pay over all money received in his official capacity * * * then this obligation shall be void." The petition then alleges that the said Ferris did not faithfully pay over all money coming into his hands as probate judge to the extent of \$634.61. This amount was part of a large sum deposited in the Commercial Bank of Cincinnati, which failed and went into liquidation, and failed to pay over said amount to said Ferris or his successors. The sum on deposit in the Commercial Bank at and after the time of its failure was carried on the books of the probate court as "cash in bank." When the term of Ferris expired, his successor, Nippert, accepted it as such and carried it as a cash asset. When Nippert died his successor, Malsbary, accepted it as such and carried it as a cash asset.

The petition alleges further that owing to the method of keeping the books of accounts of the probate court the said variance from actual cash on hand was not discovered until disclosed by an examination made by the state authorities in 1907. The petition alleges further that none of the defendants have paid over to Hamilton county the said sum or any part thereof and that the defendants are jointly and severally liable for the same.

The answer of Howard Ferris admits his incumbency of the office of probate judge and the giving of bond, but by way of a first defense enters a general denial. By way of a second defense he pleads the statute of limitations, which he avers is six years.

The answer of Charles F. Malsbary admits his incumbency of the office of probate judge from September 19, 1904, to February 9, 1909, and admits that when he took charge of the probate court as the judge thereof, there was a shortage on the books of said court of \$634.61 on account of the failure and liquidation of the Commercial Bank, as alleged in the petition, but he alleges that this sum had been paid and that on November 16, 1906, Kate B. Nippert, as executrix of Carl L. Nippert,

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voluntarily paid to him as said probate judge the full amount of said shortage, and that as such probate judge he gave her as executrix a good and valid and full receipt for the same, and that the said books of account of said court have been ever since in balance on account of the payment of said shortage, all of which is shown by the accounts kept in the books of said probate court.

Kate B. Nippert answers individually and as administratrix of the estate of Carl L. Nippert. She admits the deposit of the funds in the Commercial Bank and the shortage of the county funds in the amount set out in the petition, which said sum had been carried as a cash asset. By way of special defense she says that individually and not as administratrix of the estate of her husband, on or about November 16, 1906, acting under a mistake both of law and of fact, she paid said sum to the then probate judge, Malsbary. Thereafter, when apprised of the real facts in regard to the alleged shortage she applied to the commissioners of Hamilton county, who set aside the said sum as a separate fund in the county treasury in her name. She denies further any liability on the part of any of the probate judges.

It is the contention of the defendants as disclosed in their briefs that the defendants are not liable because, first, of the statute of limitations, and secondly, irrespective of the statute, because there is no liability on the part of defendants, due care having been exercised on the part of the defendant Ferris in selecting a bank, and the loss of the money having occurred through no overt act of any defendant, but by reason of facts beyond their control.

It is their contention further that the liability accrued at the time of the failure of the Commercial Bank, or in any event, prior to 1902, when Judge Ferris ceased to be probate judge.

Conceding that the bank failed in 1895 as stated in their briefs, and that the terms of Judge Ferris thereafter expired respectively in 1897, in 1900 and 1902, it is difficult to see how he could avoid liability simply because one term of office expired and another began.

It must be remembered that these actions are not against the bondsmen, but against the officials themselves. The county has a right, if it sees fit, to disregard the sureties and seek to hold

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the principals on the bonds. Regardless of what might be concealed from his bondsmen, the judge himself had knowledge of the status of affairs, and as by our statutes the probate judge is also ex-officio his own clerk, he was at liberty to carry his funds and balances in any manner of his own selection. Although the Commercial Bank had failed and the outcome was problematical, and although he could not withdraw them or draw on them as a deposit for a single penny, he chose to carry on his books and report to the county commissioners periodically that the funds he had deposited there were "cash in bank" or a cash asset. Although theoretically each of his terms was an entity in itself, yet practically and in the eyes of the law there was no severance of his relationship to the probate court and of his control over its books and its funds until his connection with the court ceased in 1902, and Carl L. Nippert became probate judge. Therefore, the cause of action as against him did not accrue until 1902, when on leaving office he failed to turn over to his successor "all moneys received in his official capacity."

It has been repeatedly held in Ohio and elsewhere that a public officer can not escape a statutory liability through theft, the failure of a bank, or other circumstances beyond his control. When through his official bond he contracts "to faithfully pay over all moneys received in his official capacity," he makes a binding contract permitting of no exceptions not strictly provided for in the bond itself. The bond being plain and unambiguous in its terms should be treated as any other written contract.

The rule is otherwise where the officer is not so bound by the terms of his bond, and in many states where there is no statutory provision, the common law requirements of "due care" is all that is demanded of the official, but such is not the law in Ohio.

But his counsel contend that the action is barred by the statute of limitations, which they assert is the limit of six years. This contention is hardly tenable. Gen. Code 11226 provides:

"An action on the official bond, or undertaking of an officer, assignee, trustee, executor, administrator, or guardian, or on a bond or undertaking given in pursuance of statute, shall be brought within ten years after the cause thereof accrued."

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The petition on its face clearly shows that the action is against the probate judges on their bonds. It is not an action for a failure to pay over money had and received. It is an action on official bonds, hence is subject only to the provisions of Gen. Code 11226. The limitation is ten years and not six years. The plea of the statute of limitations is therefore unavailing, the petition having been filed in 1909. As the terms of office of Judges Nippert and Malsbary succeeded that of Judge Ferris, it necessarily follows that the plea of the statute as to them is likewise unavailing.

The further question, however, presents itself regarding them, as to what extent, if any, they are liable in having accepted the statement of the account in the Commercial Bank in lieu of the cash itself. No question of fraud or mistake has been pleaded on their behalf. For the purposes of this case it must be held that they were fully cognizant of the status of affairs and each acquiesced in the situation as he found it. In the first place, then, each assumed the responsibility of this being a cash asset, otherwise each would have repudiated it, having knowledge that there was a deficit between the amount of cash actually in the possession of the court and what purported to be cash on hand. After a voluntary assumption of the fictitious account, can they now be heard to say that they did not receive the money; that the account being fictitious and that not having received the money, they are not liable for its loss? If they accept such alternative are they not still liable under their bonds wherein they obligated themselves to faithfully discharge the duties of their office, when they voluntarily carried a fictitious account, the money not being in the possession, custody, or even under the control of the court, there being in fact a deficit? If Judge Nippert accepted from his predecessor, Judge Ferris, as cash, a doubtful asset in process of liquidation and carried that item on his books as cash, making periodical reports of such as cash to the county commissioners at the periods required by law, and if, as a matter of fact, it was not on hand, then he is liable under his bond for the deficiency. Similarly, if Judge Malsbary accepted the accounts of Judge Nippert as being correct and carried on his books as cash an item which was not in existence and cash which

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he did not have, periodically reporting this item as cash to the county commissioners when as a matter of fact he did not have such cash on hand, then he is liable under his bond for the deficiency.

The county commissioners in this petition have sued two judges and the administratrix of the other who died during his term of office, alleging that they are jointly and severally liable.

The court finds that the petition states a good cause of action against each defendant. The court further finds that the defenses as pleaded and elaborated in the briefs of counsel are not good in law save only, of course, the pleas of the general denial and of payment.

Mrs. Kate B. Nippert, widow of Carl L. Nippert, answering as an individual, says that acting as an individual and not as administratrix of her husband's estate, and acting under a mistake both of law and of fact, she paid the sum of \$634.61 to Hamilton county. If this be true, she should be relieved and the money refunded. And her answer avers a willingness on the part of the county commissioners to make such restitution under certain contingencies. This answer, however, can not be passed on as a question of law, for taken in connection with the answer of Judge Malsbary, both raise such questions of fact as are only capable of adjustment by a jury.

The petition prays for a money judgment in the sum of \$634.61. Such cause on the issues remaining under the several answers is one for submission to a jury, a jury not having been waived. It is therefore ordered that this cause be sent to a jury room for submission to a jury on the questions of fact involved.

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ACTIONS—ATTACHMENT.

[Licking Common Pleas, January Term, 1910.]

MELLVILLE GILLETT V. PULLMAN CO.

1. Attachment Does not Lie for Theft of Clothing from Sleeping Car Company Through Negligence of Its Porter.

An action for damages against a sleeping car company on account of loss of clothing taken from a berth occupied by a passenger, the loss resulting from the negligence of the porter in leaving the car, sounds in tort on which attachment does not lie under the provision Gen. Code 11819 (R. S. 5521).

2. Amendment Changing Nature and Scope of Action Denied.

An action sounding in tort cannot be changed by amendment of the petition to one sounding in tort.

[Syllabus approved by the court.]

MOTION to dissolve attachment.

F. M. Black, for plaintiff.*Squire, Sanders & Dempsey, Kibler & Montgomery and Durban & King*, for defendant.

SEWARD, J.

This is a suit in attachment brought by Gillett, against the Pullman Company to recover for a loss that he alleges he sustained by reason of some of his clothing being taken from a car on which he was passenger, between Buffalo and Columbus. A motion is made to dissolve the attachment which was issued upon this petition, and the court is called upon to determine whether the attachment should be sustained or dissolved.

An attachment was issued without bond under Gen. Code 11819 (R. S. 5521) of the statute providing that attachments shall not issue against a foreign corporation except where the obligation arises upon a contract, judgment or decree; and it is claimed that this petition sounds in tort. If it sounds in tort, and is for damages growing out of a tort, then this attachment was wrongfully issued, and should be dissolved. If it is a petition sounding upon contract, and seeks to recover damages for a violation of a contract, then the attachment and the motion

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ought not to be sustained. The sole question is whether this petition sounds in tort or upon contract. The petition says:

"The plaintiff for cause of action against the said defendant says that the defendant is a corporation organized under the laws of Illinois and is engaged in the business of building and operating sleeping cars over the various railroads of the United States; and in so operating said sleeping cars said company provides a conductor and a porter for each sleeping car; that it is the duty of said porter to make up the berths in the various sections in said sleeping car, to keep said car in order and to look after and protect property of the Pullman Company and the property of the patrons of said company, who are occupying the sections and berths of said cars.

"Plaintiff further says that on the evening of the 17th day of November, 1909, he purchased a ticket from the agent of the Pullman Company entitling him to the lower berth of car No. 57 on train No. 9, scheduled to leave Buffalo at 11:15 in the night time.

"Plaintiff further says that about the time scheduled for said train to depart, he entered said car, and shortly thereafter entered the berth which he had purchased for the night; that during the night season there was removed from his berth clothing, consisting of an overcoat and another coat; that the same were stolen and that a loss was occasioned and theft made possible by reason of the carelessness and negligence of the agents of the said defendant, the Pullman Company.

"That said porter during the run of said car and before it arrived at the destination of the plaintiff, to-wit, Columbus, Ohio, to which point the ticket plaintiff purchased entitled him to ride in the car of defendant, was guilty of negligence in leaving said car while it was not in motion and was standing at the station open so that persons other than those holding berths had free access to said car.

"That by virtue of the foregoing plaintiff has been damaged in the sum of one hundred and thirty-two and 50-100 dollars. Wherefore plaintiff asks judgment against the said defendant for \$132.50 with interest."

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The court is forced to the conclusion that this petition is a petition sounding in tort, and not upon contract.

There is no allegation here that the Pullman Company contracted to carry Mellville Gillett from Buffalo to Columbus; the terms of a contract are not set out nor breach alleged but there is an allegation that a tort was committed, and he seeks to recover damages for that tort, the damages being placed at the value of the clothing lost by him.

And so there is nothing for the court to do but to sustain this motion.

SUBSEQUENT MOTION TO DISSOLVE.

SEWARD, J. (Orally.)

This is submitted to the court upon a motion to dissolve the attachment issued upon the amended petition. The original petition in this case, as the court found, was a proceeding to recover for a tort, which Pullman Car Company was charged with having committed against the plaintiff, Gillett.

An amended petition was then filed, for the purpose of bringing the action under contract and under Gen. Code 11819 (R. S. 5521).

No attachment could have issued, or was proper to be issued, under the original petition, and this amended petition is intended to change the cause of action from that of tort to that of contract. That would give the plaintiff a right to his attachment.

Now, the question is, whether this can be done; whether the plaintiff can change his cause of action from that of tort to that of contract, and have his attachment issued upon the cause of action set forth in his amended petition?

Phillips, Code Plead. Sec. 314, refers to this matter. There is a dearth of authority in Ohio. There are plenty of authorities outside of Ohio, which are cited in the brief of counsel. The great weight of authority, as Judge Phillips says, is that it can not be done—that is, change a cause of action sounding in tort to one in contract, when it requires the allegation of a state of facts to constitute and sustain a cause of action sounding

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in tort to one sounding in contract. You must allege a breach of the contract in order to recover in a suit upon a contract.

Judge Phillips says, at Sec. 314:

“The weight of authority is to the effect that a party may not, by amendment of his pleading before trial, change the nature and scope of his action or defense; for this would not be an amendment of the original cause or defense but the substitution of another cause therefor.”

In addition to Phillips on Code Pleading, I am cited to a great many authorities outside of Ohio, holding that it can not be done, and to *Smead v. Chrisfield*, 12 Dec. Re. 296 (1 Han. 573):

“This is a motion to dismiss amended petition, and involved a similar principle to the next case. An attachment had been issued upon a claim to recover upon three promissory notes. After service of the attachment, an amended petition was filed, setting up a new cause of action. The petition ought not to stand. Such a practice would enable a party to keep an attachment alive, and add to the claims upon which it was issued new causes of action from time to time, to the serious detriment of substantial rights and intervening claims.”

The court is driven to the conclusion that the great weight of authority is to the effect—and there are no authorities to the contrary in Ohio—that the great weight of authority is that such an amendment can not be made; and the court holds that this motion ought to be sustained, and it is sustained.

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INJUNCTION—WORK AND LABOR.

[Hamilton Common Pleas, June 6, 1912.]

*JOURNEYMEN'S HORSESHOERS LOCAL UNION NO. 12 ET AL. v.
MASTER HORSESHOERS' PROT. ASSN. ET AL.

Employees' Association may Enjoin Employers' Association From
Enforcing Order for Lockout of Such Employees.

Injunction lies against enforcement of an order for a lockout by an employers' association, if, under the rules of the association making the order, members are liable to fine or expulsion for disobedience thereof; and an association of employees, working for members of the employers' association, have a direct interest in such order and as such may enjoin its enforcement.

John Weld Peck, for plaintiffs.

Province Pogue and *M. F. Galvin*, for defendants.

DICKSON, J.

The plaintiff, a union, and individual members thereof, complain that the defendants, an association, and individuals and partners, members thereof, have entered into an agreement to discharge all their employees when ordered so to do, and that this agreement gives a right to punish any member who refuses to obey such an order; that the defendant association is unlawfully engaged in restraint of trade in that no member thereof is permitted to shoe a horse which has been customarily shod in another shop; that the defendant association has unlawfully ordered a lockout, ordering all its members to discharge all of its journeymen employees; that this order of this lockout is distasteful to many of its members who have obeyed the order because

*Memorandum opinion filed in the circuit court, July 20, 1912:

"By the Court.

"From the evidence in the above case and the law applicable thereto the court is of the opinion that the plaintiffs are entitled to the relief prayed for in their petition.

"A decree may therefore be taken similar to that entered in the court of common pleas, excepting as to that portion thereof relative to the infliction of any penalty of fine or expulsion upon any member of the defendant association, the rule involving the same having been rescinded."

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compelled so to do by the rules of the association. The plaintiffs ask an injunction against the defendants, and that the defendant association be ordered to permit each of its members "to pursue his own will and desire in connection with the employment and retention of his employees"; ask also for a dissolution of the association.

All parties hereto are engaged in the horseshoeing business.

We have before this court, a tribunal created by the law for justice, the employer and the employe. Each side asks this court to settle in certain respects the rights of labor and capital—that is, property rights.

There can exist no right without a duty. The employed and the employe each has its combination, or union, or association, organized for certain advantages—here, property rights. The employer's property right is capital. The employe's property right is labor. Capital exists only through labor. Labor exists only through capital. The one can not exist without the other, and neither without a governing power—the government, the law.

Labor or capital, each in its property right, owes to the other a duty, and this duty must be enforced by the law. The supreme duty is to use each to the other ordinary care, reasonable care, each to do to the other as it would be done by, each to so act as not to intentionally injure the other.

Each organization, or association, or union here has been advancing itself and its members to the best possible point of advantage, to get as much as it can for its side. This is eminently right. But each has forgotten the rights of the other; each has forgotten the rule, live and let live. One or the other perhaps has gone too far, and hence the relations between plaintiffs and defendants are strained, and properly both are here to seek redress in a court by its rules of correct living, found to be best by long experience.

There being no disagreement as to wages or hours, etc., the employer claims the right to use certain machine made shoes. The employe claims the right to refuse to handle these shoes. Each claims that the use or nonuse of these shoes vitally affects his property right.

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The employer has a right to hire or refuse to hire and to use that material which best suits him.

The employe has a right to be hired or refuse to be hired and to use the material furnished him, or to refuse to be hired because the materials used do not suit him.

Thus it is seen that the rights of each are the same. In law, each may use these rights peaceably even if it destroy the property rights of the other, but no force or violence or unlawful means will be permitted by either. If the rights of an individual alone were involved, probably the rule of the survival of the fittest would obtain, and this case would not be here.

Here we are concerned with the rights of organized capital and organized labor.

The law encourages both to organize. In union there is strength—power. With power the tendency of the majority is to crush the minority, the powerful to crush the weak. It is the duty of the law, the government, to protect the minority and the weak. Organized capital and organized labor with their rights must not forget their duties; each must have a due regard to the rights of the other, and this regard we call duty.

Each in organization for its self-preservation must necessarily have the right to impose restrictions upon its members, but this right must be used reasonably and with a due regard to the rights of others, and it must never be forgotten that to exist each must live and let live.

Capital and labor in this case, each claims to have exercised its legal rights.

The fact that capital and labor are both idle, both suffering, shows that something is wrong; therefore, some duty has been neglected.

The evidence clearly shows that the direct or proximate cause of the present trouble is the desire of the Masters Association to use machine made shoes. To this end this association sent a communication to the Journeymen's Union stating that certain machine made shoes would be used and fixing a day for an answer. Before answer day, one of the members of the Journeymen's Union left his forge. Immediately thereafter the Masters Association, through its officers, ordered

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a lockout in all the shops belonging to the association. All the shops in the city except three obeyed the order and are idle. Several of the shops did not desire a lockout, but obeyed orders. Some of the shops which have shut down desire to reopen and are satisfied not to use machine made shoes.

The only real question at issue is, did the Masters Association do its duty under the law when under the conditions existing it ordered a lockout? Among the rules of the Masters Association binding upon all its members is one which prescribes certain penalties for a disobedience of an order of the association, among which is expulsion from membership and a money fine. This right of membership is valuable. This threat to expel is unreasonable, is coercion and intimidation, and therefore unlawful. The plaintiffs herein have a direct interest in this illegal lockout. It directly and injuriously affects their property rights, that is, right to use, to sell their labor at its best advantage.

All rules, regulations, constitutions and by-laws of corporations, unions, associations, etc., must be reasonable and lawful, or a court of equity will enjoin their enforcement and will in a proper case and between proper parties, dissolve the concern violating the law.

The enforcement of the order for a lockout is not binding upon the members of the Masters Association, and its enforcement against the members will be enjoined.

A dissolution of the defendant association, corporation, will not be ordered.

Superior Court of Cincinnati.

ACCOUNTING—TRADE NAMES.

[Superior Court of Cincinnati, November 3, 1911.]

STAR DISTILLERY Co. v. MIHALOVITCH-FLETCHER Co.

Receivers Justified in Using Trade Name, Adopted and Used With Approval of Originator, by Manufacturing Company Previous to Receivership Notwithstanding Originator Forbid Receivers' Use Thereof, and on Accounting Net Profits Alone Considered, Gross Profits Including Expenses of Receivers' Administration, Bad Debts, Etc.

Where, under orders of court, receivers were engaged in running a complicated manufacturing corporation which had been manufacturing fruit syrups, flavoring extracts, etc., under the name "Vionana" and where such name had been adopted and used on its goods upon the actual suggestion of the intervenor who had been in charge of the Vionana department, and who previous to such employment owned and controlled all the stock of the Vionana Specialty Company, a separate corporation, which had manufactured similar goods, and where such name had never been registered as a trademark, and where the apparent evidence of ownership of such name, in the shape of transferred certificates of stock and the stock-book of said specialty company were in the possession of the Mihalovitch-Fletcher Company and receivers, and where it appeared that such corporation spent thousands of dollars advertising its goods under such name and claimed to be the owners of such trade-name, and under such circumstances and upon advice of counsel receivers continued to use such name, notwithstanding intervenor notified them not to do so;

- (1): That, irrespective of the court's ultimate finding upon the question of ownership in such trade-name, the receivers, under the circumstances, were justified as reasonably prudent business men in believing the name was the property of the corporation and could not be charged with fraud or intentional wrong in continuing to use the name as same had been used when they took over the business; and
- (2): That in a proceeding for an accounting of profits for alleged infringement by receivers, considerations of equity must be applied in determining the amount of profits to be allowed. In such case net and not gross profits will be allowed, after deducting a ratable proportion of the general expenses incurred by the receivers in the operation of said business. *Regis v. Jaynes*, 191 Mass. 245; *Nelson v. Winchell*, 203 Mass. 75, distinguished.
- (3) In determining the expenses chargeable against gross profits, store rent, clerk hire, fuel, power and the general expenses of the receivers in conducting such business are to be deducted in proportion as the aggregate sales in such department bear

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proportion to the sales in all departments. The rule in the *Tremolo Patent Case*, 23 Wall. 518, followed.

- (4) Losses, such as bad debts, discounts, etc., incurred in the sales of goods sold under such trade-name are also to be deducted in ascertaining the net profits of the sales.
- (5) Goods sold in bulk, to which no such labels are attached, but bearing a stock shipping tag, affixed by some clerk, and which tag was in no way descriptive of the character of the goods and which tag was affixed without direction of receivers and without evident intention to violate the court's decree, are not properly included in the accounting.

[Syllabus by the court.]

MOTIONS to modify orders.

Kelley & Follett, for intervenor Beekman.

Sidney G. Stricker and Harmon, Colston, Goldsmith & Hoadly, for defendant.

HOFFHEIMER, J.

This matter came on to be heard on the receivers' motion, (a) to modify the decree heretofore entered herein; (b) on exceptions by receiver to the report of the special master in the matter of the accounting; and (c) on motion to refer back to the special master for correction; and also on application of the intervenor, Beekman, to modify the decree heretofore entered herein.

Taking up intervenor's application first, the court, it may be noted, is asked to strike out of said decree certain operating expenses enumerated in said decree, and in the sixth finding thereof, for the reasons that none of said operating expenses are a proper charge to be borne by the business done by the receivers, in goods carrying the trade-mark "Vionana" and that none of said expenses were made necessary or were in any way increased, by the carrying on of the Vionana department, in connection with the other business carried on by the receivers, during the accounting period, and because none of said expenses, as matter of law, are properly chargeable against the business done by the receivers, in goods carrying the "Vionana" name.

Reliance for this application is placed on *Regis v. Jaynes*, 191 Mass. 245 [77 N. E. Rep. 774]; *Nelson v. Winchell*, 203

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Mass. 75 [89 N. E. Rep. 180; 23 L. R. A. (N. S.) 1150], and certain other cases.

If the rule of these cases is to be applied here, then obviously these receivers (unless it could be said they sustained the burden and proved by that method to what extent the operating expenses of the entire business were increased by carrying on the "Vionana" department, which it is insisted they made no endeavor to do), must be held to account to intervenor on the gross, instead of on the net profits, as this court has heretofore decreed.

The rule which intervenor contends for, however, is an extreme one, and attention to the cases cited will show, that it is based on the principle that "the wrongdoer should not be permitted to derive a direct advantage from his own wrong" (*Regis v. Jaynes, supra*); and if by reason of his wrong the infringer causes confusion of property or of goods, he does so at his peril, and, if unable to separate the items, he must pay the penalty for his wrong.

All the cases cited by intervenor show that the respective courts had uppermost in their minds the fact that the person against whom the rule was declared was a wrongdoer, who might derive some personal profit or advantage by reason of his own wrong, unless such rule were invoked.

That it was this element of fraud or wilful wrongdoing that called for the rule, is well illustrated by the language of the court in *Benkert v. Feder*, 34 Fed. Rep. 535 (cited by intervenor):

"One who deliberately and knowingly uses another's trademark, commits a palpable and unmitigated fraud, for which there is no possible excuse."

In *Regis v. Jaynes*, and in *Nelson v. Winchell, supra*, the court announce, in substance, that the wrongdoer is not to be permitted directly or indirectly to profit by his own wrong; and the same reasons underlie *Menendez v. Holt*, 128 U. S. 514 [9 Sup. Ct. Rep. 143; 32 L. Ed. 526]. However just such rule may be in a typical infringement case, where such element of intentional or wilful appropriation of another man's property is present, and where there is possibility of personal profit or

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advantage in the wrongdoer, this case presents no such considerations. This was not a case of piracy nor wilful, deliberate or intentional appropriation on the part of these receivers of intervenor's property for purposes of private gain or otherwise. The receivers could not have derived any personal advantage, "directly or indirectly," in what they did. These officers simply took over and attempted to run in good faith, and for the benefit of others, this vast, confused and complicated business, and as it was cast into their hands. This business included the "Vionana" department, ownership of which trade-mark intervenor subsequently claimed.

A long time prior to the receivership, intervenor himself, then in the employ of the Mihalovitch-Fletcher Company (and he was in their employment practically up to the time of these proceedings), suggested that the firm use this name (see Beekman's testimony, pp. 41, 42); and the firm did use it. And the manner in which the name had been and was being used by the firm, the fact that it had spent many thousands of dollars in advertising it, as its "Vionana" Department, reinforced by the further fact that it had in its possession the apparent ownership of title in the shape of the transferred stock-books and certificates of the Vionana Specialty Company, certainly all of these were circumstances which would have justified any reasonably prudent business men, especially after taking advice of counsel, as was done here, in believing, just as receivers believed, that this name, "Vionana," was the property of the Mihalovitch-Fletcher Company, irrespective of the ultimate conclusion of this court, when it came to try the question of title. All these circumstances, it seems to me, should, in fairness, be construed so as to relieve these receivers from all imputation of fraud or wilful wrongdoing, and so as to save the estate from the application of a rule, which, as I have endeavored to point out was intended and designed to prevent the wrongdoer himself from personally benefiting or profiting by his own wrong. Even if these receivers, in continuing to use the name after Mr. Beekman gave notice of ownership, were in the wrong, I do not believe, under the circumstances as detailed, the creditors ought to be penalized for such error, and particularly where such error

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was partly the result of intervenor's own act in originally suggesting the use by the firm of the name "Vionana" in connection with the Mihalovitch-Fletcher business, and in otherwise acquiescing in a course of business which gave the receivers reasonable grounds to believe they were the owners. In apparent conflict however with the cases cited by intervenors is the Tremolo patent case.

In the Tremolo patent case *Tremaine v. Hitchcock*, 90 U. S. (23 Wall.) 518 [23 L. Ed. 97], the court say:

"The defendants, vendors of organs generally, and selling sometimes organs having a patented invention consisting of a combination of what was called a 'tremolo attachment' with the organ; and selling sometimes organs without the attachment, were decreed guilty, in their sales of organs with the attachment, of infringing the complainant's patent.

"*Held*: 1. That in the ascertainment of profits made by them from sales of organs with the tremolo attachment it was proper to let them prove the general expenses of their business in effecting sales of organs generally, and deduct a ratable proportion from the profits made by the tremolo attachment."

And in the opinion of the court, it is stated:

"We can not see why the general expenses incurred by the defendants in carrying on their business, such expenses as store rent, clerk, hire, fuel, gas, portorage, etc., do not concern one part of their business as much as another. It may be said that the selling a tremolo attachment did not add to their expenses, and therefore that no part of those expenses should be deducted from the price obtained for such an attachment. This is, however, but a partial view. The store rent, the clerk hire, etc., may, it is true, have been the same, if that single attachment had never been bought or sold. So it is true that the general expenses of their business would have been the same, if instead of buying and selling one hundred organs, they had bought and sold only ninety-nine. But will it be contended that because buying and selling an additional organ involved no increase of the general expenses, the price obtained for that organ above the price paid was all profit? Can any part of the whole number sold be singled out as justly chargeable with all the expenses of the

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business? Assuredly no. The organ with a tremolo attachment is a single piece of mechanism, though composed of many parts. It was bought and sold as a whole, by the defendants. It may be said the general expenses of the business would have been the same if any one of these parts had been absent from the instrument sold. If, therefore, in estimating profits, every part is not chargeable with a proportionate share of the expenses, no part can be. But such a result would be an injustice that no one would defend."

See also, *Baker v. Slack*, 130 Fed. Rep. 520 [65 C. C. A. 138].

It will thus be seen that the court in the Tremolo patent case has laid down a rule more liberal than the one in *Regis v. Jaynes*, *supra*, and similar cases, and whether we consider the Tremolo patent case as an ordinary infringement case, or attempt to distinguish it as Sawyer, J., has endeavored to do, in *Benkert v. Feder*, *supra*, it is sufficient authority for the rule heretofore announced by this court. If any equitable considerations prompted the rule in the Tremolo patent case, certainly such considerations are present here.

In view of the foregoing, the court is of opinion that justice will be best subserved by adhering to the rule heretofore announced, and accordingly, intervenor's motion to modify the decree in the particulars mentioned will be overruled.

With reference to the first specification in receivers' motion to modify the decree I am of opinion that the amount of goods "carrying private labels and no labels," and fixed in the decree at \$15,567.64, should be increased, in accordance with the claim of receivers and according to the figures of Mr. Sibbald, the bookkeeper and afterwards expert. While it may be true that the shipping clerk may have appended some stock labels upon which appeared the name "Vionana," I do not think that these cherries in bulk were sold as Vionana goods. It does not appear that the receivers intended or ordered that such labels be affixed, nor does it appear that these labels were descriptive in any way of the character of these bulk cherries. The mere fact that some shipping clerk may have attached such label without

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intending to do wrong hardly brought these goods within the spirit of the court's ruling.

The decree should be altered or amended in the other specification also, and as set out in receivers' motion.

Exceptions 1, 2, 3 and 4 of receivers to the finding of the special master go to the cost of cherries, but, as I understand it, after eliminating from consideration all other elements which had been agreed upon by the parties, such as cost of sugar used in processing, amount and value of sugar absorbed by raw fruit in processing, etc., the claim is, that the special master, in reaching his conclusion, erred on the amount, that is to say, the number of pounds of pitted fruit in a case of six half gallons of whole cherries.

The evidence on this subject before the master was conflicting, but upon reading same and considering it, I am inclined to think his conclusion was a fair one and justified by the evidence. And this would appear the more so, in view of the practical experience of the receivers themselves while conducting the business. In the absence of any palpable or material errors, even though there may be some slight discrepancies, I am of opinion that these exceptions should be overruled.

Exceptions 5-14. According to the Sibbald Report (p. 9), it is practically conceded by intervenor that there is a difference of \$314.81 on the profits on the aggregate of "soda water goods" and "grape juice" sales in favor of the receivers, for which the master failed to give credit. Since this is conceded the exceptions will be allowed and the report will be referred back to be accordingly amended.

Exception 15 goes to the special master's finding on gross profits. In view of what has been said herein on additional no label goods and additional returned goods, and Mr. Sibbald's figures (p. 9), this exception will be allowed, and the report will be referred back to be amended in this respect.

Exception 16. Complaint is made that the special master wholly failed to consider, in ascertaining the profits, the items set forth in this exception. Of this amount, intervenor concedes that \$2,325.65 is a proper charge, but contends that \$920.47 of said items, representing cost and expense for freight, outbound

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and inbound, and bad debts, are not proper charge, upon authority of *Nelson v. Winchell*, *supra*. For reasons elsewhere stated, this court has not followed that case, and if it is not in error in so doing, and there being no dispute that the sum \$920.67 was expense necessarily and actually incurred, this sum, together with \$2,325.65, should have been taken into account by the master. The exception is, therefore, allowed, and the report will be referred back to be amended accordingly.

Exception 17. As part of the expense necessarily incurred, and in accordance with the reasons just stated, the master should have allowed the item of \$266.82, being for salesmen's salaries and expenses for taking orders previous to date of accounting for goods which were shipped during the period of accounting. Exception 17 is allowed in such particular, and the report will be amended accordingly.

Let a decree be prepared in accordance herewith.

TAXATION.

[Franklin Common Pleas, October 30, 1911.]

STATE EX REL. GRANDVIEW HEIGHTS V. FRED M. SAYRE, AUD. ET AL.

Validity of The Smith One Per Cent Law, and Application to Contracts in Force.

While it is probable that contracts entered into in good faith by a municipality prior to the enactment of act 102 O. L. 266, Gen. Code 5649-3a, would be protected by constitutional guaranties against impairment by limitations on the taxing power, yet mandamus lies to compel the placing on the tax duplicate of the levy provided in the budget as originally fixed, and thereafter reduced by the budget commission, where nothing is shown beyond a possibility that contracts may be impaired or payments be delayed, and it does not appear that the discretion lodged in the budget commission has been abused, and there is nothing more than a difference in judgment between the budget commission and the corporation as to needs for the year, and the corporation failed to avail itself of its opportunity to present its case to the commission.

Smith W. Bennett, for relator.

E. C. Turner, *H. C. Sherman* and *Clarence Laylin*, for respondent.

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DILLON, J.

The relator alleges that the county board of budget commissioners, acting pursuant to the provisions of Gen. Code 5649-3a (102 O. L. 266), corrected and reduced the budget as presented by the said village, striking from said budget the amount of \$1,501.94, all of which is necessary for the needs of the said village. The relator submitted its annual budget setting forth in itemized form its estimate for the monies needed for the incoming year; and in order to make appropriations for each of the several objects for which money had to be provided from the monies known to be in the treasury, from the collection of taxes, and all other sources of revenue, and all expenditures within the following six months, and to provide for the payments of the amounts of money necessary to carry out the terms of contracts made and entered into by and between the relator and others prior to June 1, 1911, it was compelled to and did provide in said budget for a levy on the taxable property of the corporation of a sufficient number of mills to provide the sum of \$3,800. The petition further alleges that the defendant in examining the budget claimed to have found that this levy and rate of taxation exceeds the authorized amount which may be levied by the relator and so decreased the said tax rate, striking from the budget the said sum of \$1,501.94, and re-adjusting the balance, to wit, \$2,298.06, to the various needs of the village.

The plaintiff says that the act, 102 O. L. 266, commonly known as the Smith 1 per cent law, thus limiting the said village to a 1 per cent tax rate is invalid and unconstitutional in so far as its strict enforcement in this case would impair the obligations of two contracts made and entered into by said village prior to the enactment of said law. It is further claimed that the said law is invalid in that it also violates Art. II, Sec. 26 of the Ohio constitution, in that it is not of uniform operation throughout the state.

The defendants' answer, in substance, alleges that the said village will have a sufficient amount of money to carry on its needs under the tax rate as fixed, and that they gave the relator a hearing and carefully went over all the items of neces-

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sary expenses for the running of said village, and that the amount which they fixed is just and ample to meet all its needs, when taken into consideration with other funds which the said village has or will have at its disposal.

The answer also alleges that at the hearing the said relator failed to avail itself of its right to inform the budget commission of the facts desired by it, and that, although it appeared by its regular counsel, it refused to make any suggestions or to assist the budget commissioners.

A great many of the different items are set forth in the answer justifying the action of the budget commission in detail. A denial of some of these items is made in the reply.

It is sought in this case to have the court render an opinion as to whether or not the so-called Smith 1 per. cent, law can constitutionally apply in a case where a municipality has previously to the enactment of said law entered into valid contracts, which said contracts would be impaired by the enforcement of said law as to them. The question is most interesting and it is highly probable that the decisions of the courts will sustain the contention of the relator upon that naked legal proposition. It must be conceded that a contract may be impaired by limitation of taxation power, and even be destroyed, and therefore, the constitutional guaranty in all probability protects such contracts as were made in good faith prior to the enactment of such law. But I do not consider this question involved in this case.

The two contracts referred to are as follows:

One, employing legal counsel pursuant to the provisions of Sec. 205 of the Mun. Code, amounting to \$300 per year; and one for sewer expense amounting to \$300.

It will be noted that the parties to these contracts themselves are not complaining here, and it is doubtful whether or not at this present time the contracts could be impaired, even if it be assumed that there will be such a deficiency in revenue as will not meet them. A mere possibility of impairment and a mere possibility of delay in payment does not necessarily constitute an impairment, such as should interfere with the taxing power; but in this case the budget commission, acting pursuant to said

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Gen. Code 5649-3a and following sections, had a function to perform, just as much as did the village itself. This law lodges in this county budget commission the express power of adjusting the various amounts to be raised so that the total amount thereof shall not exceed in any taxing district the sum authorized to be levied by law. This budget commission has power to revise and charge the estimates, and reduce any or all the items submitted to it.

This court, therefore, will not substitute its discretion for that of the budget commission, unless it clearly appears that its discretion has been abused. It does not so clearly appear in this case. Agreeably to the well settled maxim of law, this court will presume in favor of the correctness and legality of the proceedings of this budget commission. The court is left in considerable doubt in this case as to some of the facts. The burden is upon the relator to show clearly to this court that the actual necessity exists which it claims exists. So far as the evidence in this case shows, it is simply a disagreement—a difference in judgment—between the two as to the needs of the village.

Again, the village had an opportunity to be heard after the budget commission had charge of the case, and relator failed to avail itself of any additional facts other than what had already been presented to the said commission.

There is a dispute between the parties as to some of the needs of the village, as well as to some of the sources of income which the village will have. The court will again adopt the finding of the budget commission in whom is lodged the power to decide in such case.

So far as the village itself is concerned, it must, like all other municipalities and all other individuals as well, live within its means, and I can not find in this case that there is any ground for the court to interfere with the action of the budget commission.

Judgment, therefore, will be rendered accordingly.

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BANKS AND BANKING—BILLS AND NOTES—FORGERY.

[Putnam Common Pleas, February 15, 1913.]

J. F. JONES' SONS V. PEOPLES BANK CO.

1. Rule Eliminating Endorsement of Negotiable Instrument Payable to Fictitious Person not Applicable if Drawer Induced by Fraud.

The rule of law that a negotiable instrument made payable to a fictitious person or order is, in effect, an instrument payable to bearer and needs no endorsement to pass it to another in the commercial world and affairs, applies only where it is so made with the knowledge of the party making it and does not apply where the maker or makers, supposing the payee to be a real person and intending payment to be made to such person or his order, are induced by the fraud of another to so draw it.

2. Bank Paying Check Drawn to and Endorsed by Fictitious Payee by Drawer in Ignorance of Fact Cannot Recover Against Maker.

Where, by the fraud of a third person, a depositor of a bank is induced to draw his check payable to a nonexisting person or order, the drawer or maker being in ignorance of the fact and intending no fraud, the bank on which the check is drawn is not authorized to pay it and charge the amount of the instrument so drawn to the account of its customer on the endorsement of the party presenting it, although the instrument appears to have been previously endorsed by the party named as payee. Such endorsement is in effect a forgery, and the payment thereon by the bank confers no right on it as against the maker or drawer of the instrument—the check.

3. Bank Bound to be Satisfied as to Genuineness of Indorsed Check Before Payment.

In the absence of a course of dealing or understanding to the contrary between the parties, that is, as between the drawer of the check and the bank paying it, the duty of the banker is, in all cases, to pay the check to the person named or his order where the terms of the check are such; and the bank may and should withhold payment of the check until fully satisfied as to the genuineness of the endorsement.

4. Rule of Care Required of Bank and Depositor.

The ordinary rule of law is that a bank is bound to know the signature of its depositor before it is authorized to pay a check drawn by such a depositor to the order of a person named therein, and this rule is fixed to protect the rights of the depositor. But if the carelessness of the depositor and his want of ordinary care contributed to the deception of the bank, such person would not be in a position legally to enforce such general rule against the bank.

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5. Burden on Person First in Fault Act Resulting in Fraud or Forgery.

Where one of two interested person or parties must suffer because of a fraud of forgery committed or perpetrated, justice imposes the burden upon him who is the first in fault and put in operation the power which resulted in the fraud or forgery.

6. Depositor's Duty to Examine Checks Paid and Detect Forgeries in Reasonable Time.

It is the depositor's duty, when his pass book has been written up and returned to him with the checks charged to his account, to examine them within a reasonable time thereafter and report any forgeries discovered. After the lapse of a reasonable time a presumption arises that the checks of the depositor issued against his bank are correct, and the depositor having failed to examine them at a proper time can not recover from the bank the amount paid on checks subsequently discovered to be forgeries without proving that the bank could have, by the use of ordinary care, detected such forgery.

H. D. Grindle and Kent W. Hughes, for plaintiffs.

Handy & Unverferth, W. H. Leete, H. S. Core and J. O. Ohler, for defendant.

SCOTT, J.

The issues in this case arise upon the pleadings of the parties to the suit. On March 2, 1911, the plaintiffs, C. H. Jones and G. E. Jones, partners doing business under style and firm name of J. F. Jones' Sons, filed in this case their petition against the defendant, The Peoples Bank Company of Columbus Grove, Ohio, a corporation, and the plaintiffs say in substance in their pleading that the defendant is a banking corporation organized and existing under the laws of the state of Ohio, owning and conducting a bank at Columbus Grove, Ohio; that these plaintiffs had on deposit with said defendant subject to be drawn out by their check at all times hereinafter mentioned a sum of money greater than the amount of the several checks hereinafter named and described and greater in amount than the aggregate of said checks hereinafter described.

That on June 29, 1909, plaintiffs drew their check in the sum of \$100, payable to D. A. Earnest or order and drawn on the defendant; that on July 3, 1909, plaintiffs drew their check in the sum of \$365, payable to Fred Reidy or order and drawn on the defendant; that on July 17, 1909, plaintiffs drew their check

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in the sum of \$90, payable to E. Jones or order and drawn on the defendant; that on July 17, 1909, plaintiffs drew their check in the sum of \$200 payable to O. S. Sherman or order and drawn on the defendant; that on July 30, 1909, plaintiffs drew their check in the sum of \$425 payable to George E. Charles or order and drawn on the defendant; that on August 2, 1909, plaintiffs drew their check in the sum of \$470 payable to W. H. Jones or order and drawn on the defendant; that on September 27, 1909, plaintiffs drew their check in the sum of \$120 payable to C. Balmer or order and drawn on the defendant; that on September 30, 1909, plaintiffs drew their check in the sum of \$100 payable to John Wilch or order and drawn on the defendant; that on October 13, 1909, plaintiffs drew their check in the sum of \$210 payable to E. Jones or order and drawn on the defendant; that on January 31, 1910, plaintiffs drew their check in the sum of \$550 payable to John Rossman or order and drawn on the defendant.

Each and all of the above described checks it was alleged had been procured from these plaintiffs by the fraudulent practices and false representations of one V. B. Pangle, practiced upon these plaintiffs and without any knowledge upon their part, and said checks and each of them were delivered to said V. B. Pangle to be by him delivered to the respective payees named in said checks; that said payees and each of them were fictitious persons except C. Balmer and that there was no such person or persons as said payees or either of them except C. Balmer, but that said fact was unknown to these plaintiffs at the time and for a long time thereafter and after said checks had been paid by said defendant.

Plaintiffs supposed and believed at the time said checks and each of them were drawn that the respective persons named therein as payees were real persons, and believed and supposed that said V. B. Pangle would deliver said checks and each of them to the respective persons named therein as payees; that each of said checks was endorsed on the back thereof by the endorsement of the name of the payee named therein, which endorsements and all of them of said pretended or fictitious names and of C. Balmer were forged or fraudulently or wrong-

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fully placed on said checks by said V. B. Pangle or some other persons unauthorized in the premises.

Thereafter said checks and each of them were presented to the defendant at its bank at Columbus Grove, Ohio, who paid said checks and each of them and charged the same against the account of plaintiffs; that these plaintiffs before the commencement of this action, to wit, on January 20, 1911, informed said defendant of the foregoing facts and circumstances and demanded the payment of the sum of the amount of said checks, to wit, \$2,630, to them; but that said defendant then refused and has not either before or since said demand paid the same or any part thereof to plaintiffs.

Wherefore, plaintiffs pray judgment against the defendant in the sum of \$2,630 with interest from January 20, 1911.

To the petition the defendant on November 20, 1912, filed its answer in which it says in substance, that it is a banking corporation organized and existing under the laws of the state of Ohio; that the plaintiffs during all the time named in the petition had on deposit with the defendant varying sums of money; that the plaintiffs at the time named drew said several checks against their account in the said defendant's bank, that said several checks were in due time paid to the holders by banks other than this defendant, and that in due course said checks came to the defendant duly endorsed and were paid by it, and charged to the plaintiff's account; and defendant denies each and every other allegation of fact contained in said petition.

The defendant further says that if it shall be found that the said checks described in the petition, or any of them, were obtained from plaintiffs by the fraudulent practices of the said V. B. Pangle, then plaintiffs were guilty of a want of ordinary care and diligence in executing and delivering said checks and each of them to said V. B. Pangle, and that in the exercise of due care, under the circumstances, plaintiffs could, would and should have discovered said fraud and each of them. Said defendant further says that the check described in said petition, payable to John Rossman, or order, in the sum of \$550 and dated January 31, 1910, was, prior to February 3, 1910, paid to the bank through which it was received, by said defendant, and

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charged to the account of plaintiffs, and that on or about February 3, 1910, a statement of the payment of said check, was made to plaintiffs, and the check returned to them, from which said time said check has remained in possession of said plaintiffs and no one else; that the check dated June 29, 1909, for \$100, payable to D. A. Earnest, or order, and that of July 3, 1909, for \$365, payable to Fred Reidy, or order, and that of July 17, 1909, for the sum of \$90, payable to E. Jones, or order, and that of July 17, 1909, for the sum of \$200, payable to O. S. Sherman, or order, were each and all paid to the said banks from which they were received by the defendant prior to July 23, 1909, and that on or about August 3, 1909, a statement of the payment of said checks was made by said defendant to plaintiffs and each and all of said checks then and there returned to plaintiffs, from which time each and all of said checks have been and remained in the possession of plaintiffs, and no one else; that the check dated July 30, 1909, for \$425, payable to George E. Charles, or order, and that of August 2, 1909, for the sum of \$470, payable to W. H. Jones, or order, were each of them paid by the banks through which they were received and charged to the account of plaintiffs prior to August 4, 1909, and that on or about September 3, 1909, this defendant made a statement of the payment of said checks to the plaintiffs, and each and all of said checks were then and there returned to plaintiffs, from which time each and all of said checks have been and remained in the possession of plaintiffs, and no one else; that the check dated September 27, 1909, for the sum of \$120, and payable to C. Balmer, or order, and the check dated September 30, 1909, in the sum of \$100, payable to John Wilch, and the check dated October 30, 1909, in the sum of \$210, payable to E. Jones, or order, were each and all paid by the defendant to the banks through which they were received prior to October 15, 1909, and that on or about November 3, 1909, this defendant made a statement to the plaintiffs of the payment of said checks, and all of said checks were then and there returned to plaintiffs, from which time each and all of said checks have been and remained in possession of the plaintiffs, and no one else; that on said dates aforesaid, to wit: on August 3, September 3, November 3, 1909,

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and February 3, 1910, and each of them, the plaintiffs and defendant settled the existing account between them, and that more than one year elapsed from the time of said settlement prior to the commencement of this action and before any notice to or any action was begun on this defendant for said sum of money.

Defendant further says that the plaintiffs ought not to have and maintain said action, because if it shall be found in this case that said checks or any of them were obtained by the fraudulent practice of the said V. B. Pangle, the plaintiffs could, by the use of ordinary diligence and care, and should have discovered within ten days after the giving of said checks, that they had been defrauded, and that the plaintiffs were careless and negligent in not making said discoveries and each of them within said time; that the said V. B. Pangle was obtaining said checks by fraudulent practices and with intent to cheat and defraud; and that if any of the said checks were obtained by fraudulent practices, by the said V. B. Pangle, it was without the knowledge of this defendant, and without the knowledge of circumstances to put this defendant on inquiry, and that each and all of said checks were paid by this defendant in good faith and in due course.

Defendant further says that the said V. B. Pangle was in the employ of the said plaintiffs during all of said time in the purchase of timber and other merchandise for the plaintiffs and was held out by the plaintiffs to the defendant to be their agent with authority to act for them.

Defendant further says that said plaintiffs in each and all of said transactions were guilty of a want of care and diligence and are estopped from prosecuting this suit upon the cause of action set forth in the petition, because at the time each of said checks were paid and said statements made by plaintiffs to defendant, and said checks returned as aforesaid, the said V. B. Pangle was reputed solvent; that Nov. 21, 1910, the said V. B. Pangle filed his petition in, and was declared a bankrupt by, the district court of the United States for the northern district of Ohio, western division, and that said Pangle became insolvent long after the payment of said checks, and that during all of the time from July 3, 1909, to February 3, 1910, the amount

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represented by said checks and each of them could have been collected of the said Pangle, and during all of said time said plaintiffs had ample opportunities, by use of any diligence, to discover said fraud and recovering of said Pangle the amount of said checks and each of them during all of said time, and that without reason and without knowledge of facts to put them on inquiry, said plaintiffs trusted said Pangle and permitted him to accumulate indebtedness and become insolvent; and that plaintiffs failed, during all of said time, to notify the defendant of said fraudulent practices and that said checks were not genuine checks properly endorsed, whereby said defendant was prevented from protecting itself against said claim and from recouping from said V. B. Pangle; and that the said plaintiffs failed to notify said defendants until immediately before the beginning of this suit of any claim that said checks were wrongfully paid, whereby defendant says plaintiffs are estopped from prosecuting this action.

Defendant further says that at the several dates mentioned in plaintiffs' petition as being the dates of the several checks issued and made by said plaintiffs, and at all times after June 29, 1909, until some time after January 31, 1910, the said V. B. Pangle was the agent, servant and employe of plaintiffs, and engaged in acting for them in the purchase of supplies for their manufacturing business, and said several checks were issued by plaintiffs either in payment for supplies before that time purchased by said Pangle for plaintiffs or were given to said Pangle on account of supplies to be made by said Pangle, purchased for plaintiffs, and that said plaintiffs received either from said Pangle or other person or persons, value for each of said several checks, and plaintiffs suffered no loss whatever by reason of the execution and delivery of said checks and the subsequent payment thereof by defendant.

The defendant further says that each and all of said checks were drawn after June 29, 1909, and that by drawing said checks and each of them and delivering possession thereof to the said V. B. Pangle, said defendant then and there admitted and guaranteed that said payees, in said checks, and each of them,

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were then in existence and not fictitious persons and that they were capable of endorsing said checks and each of them.

Wherefore, this defendant prays that the petition of plaintiffs herein be dismissed, and that it recover its costs herein, and for all other relief.

To that answer the plaintiffs on February 12, 1912, filed their reply, denying each and every allegation in defendant's answer, except those allegations that are admissions of the averments contained in plaintiffs' petition. Wherefore plaintiffs pray as in their petition set forth.

The case was tried to a jury, who were instructed by Judge Scott orally as follows:

"I charge you, gentlemen of the jury, that the rule of law that a negotiable instrument made payable to a fictitious person or order is, in effect, an instrument payable to bearer and needs no endorsement to pass it to another in the commercial world and affairs, applies only where it is so made with the knowledge of the party making it and does not apply where the maker or makers, supposing the payee to be a real person intending payment to be made to such person or his order, is induced by the fraud of another to so draw it.

"Where, by the fraud of a third person, a depositor of a bank is induced to draw his check payable to a nonexistent person or order, the drawer or maker being in ignorance of the fact and intending no fraud, the bank on which the check is so drawn is not authorized to pay it and charge the amount of the instrument so drawn to the account of its customer on the endorsement of the party presenting it, although the instrument appears to have been previously endorsed by the party named as payee. Such endorsement is in effect a forgery, and payment thereon by the bank confers no right on it as against the maker or drawer of the instrument, the check.

"In the absence of a course of dealing or understanding to the contrary between the parties, that is, as between the drawer of the check and the bank paying it, the duty of the banker is, in all cases, to pay the check to the person named or his order where the terms of the check are such; and the bank may and should withhold payment of the check until fully satisfied as to

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the genuineness of the indorsement. But, this rule of law, as enunciated and handed down to us by the highest legal tribunal of our state, must be used and can obtain only in cases where the facts fit it. Whether it may be followed and adhered to in any particular case, depends entirely and solely upon the facts of each particular case in which the rule is sought to be invoked.

"The ordinary rule of law is that a bank is bound to know the signature of its depositor before it is authorized to pay a check drawn by such depositor to the order of a person named therein, and this rule is fixed to protect the rights of the depositor, but if the carelessness of the depositor and his want of ordinary care contributed to the deception of the bank, such person would not be in a position legally to enforce such general rule against the bank.

"It therefore becomes important in this case, to determine from and in the light of all of the evidence and circumstances in this case, whether the plaintiffs, doing business under the style and name of J. F. Jones Sons, as well as the defendant bank, are free from negligence in the matter of the several and numerous transactions shown by the evidence to have been had by and between them, as well as the several and many transactions shown to have been had by and between the plaintiffs and the man Pangle.

We have another salutary rule of law that may be applied, and that rule briefly stated is, that where one of two innocent persons or parties must suffer because of a fraud or forgery committed or perpetrated, justice imposes the burden upon him who is the first in fault and put in operation the power which resulted in the fraud or forgery. It is not every wrong for which the law provides a remedy, but only such wrongs that the law recognizes as remedial.

"And so, in arriving at your conclusion in this cause, naturally you will be led along the lines of your investigations to inquire, in the light of all of the evidence and circumstances in the case, into the conduct of the plaintiffs and the defendant bank, and also into the conduct of the plaintiffs relative to the several alleged transactions involved in this controversy and

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suit, the putting in passage, commercially, the several checks in question in this suit.

“Were these exhibits A to J, these checks, or any of them, issued by the plaintiffs to persons, as payees, then unknown to them? Were they issued in the names of fictitious persons or their order, and were they issued without fraud, and did the plaintiffs at the time or times of the issuing of said checks suppose the several payees thereof to be real persons, intending payment or payments of said checks, or any thereof, to be made to such person or persons or his or their order? Are the endorsements on said checks, or any thereof, forgeries? Did the alleged several payees, or any of them, receive the money on said checks or any of them? Did the said several alleged payees named in said checks, or any of them, receive the money on any of the several checks in question in this case or did they not?

“If you shall find by a preponderance of the evidence in the case that any of said several payees did receive the money on any of said several checks by endorsing the same and obtaining the sum or sums of money named in any of said checks, then it is wholly immaterial, so far as this cause is concerned, whether the plaintiffs obtained the timber or property or any thereof, for which said checks or any thereof were given in payment, if they or any thereof were issued and delivered to be used in payment of any timber alleged to have been purchased by the man Pangle, either for himself or said plaintiffs.

“Enquire into the transactions and relations of the plaintiffs and the man Pangle as they have been depicted and portrayed by the evidence and circumstances in this case. Was the man Pangle the agent or representative of the plaintiffs in the matter of the several transactions and dealings shown by the evidence and circumstances in the case to have been had by and between the plaintiffs and Pangle? Was Pangle clothed with authority to act for the plaintiffs in and about the several alleged transactions involving the issuing and delivery of the said several checks in question herein? Did the plaintiffs, as such partners use or exercise ordinary care and prudence relative to the alleged several acts and transactions of the said plaintiffs and said Pangle? Or, does the evidence and circumstances in the

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case show that the said plaintiffs were negligent in any or all of the matters and things in dispute and controversy in this action?

"If you shall find, gentlemen, by a preponderance of the evidence in the case that the man, V. B. Pangle, was the agent or representative of the plaintiffs and acting for them as such at the time, or times when it is alleged the plaintiffs executed the several checks in question and delivered them to the said Pangle, by him to be delivered thereafter to the said several payees named in said checks, and that the plaintiffs, by so treating and dealing with and through said Pangle placed it in the power of said Pangle to defraud the said plaintiffs in the matter of the said issuing and delivery of said several checks, and in the matter of the alleged forgeries, by endorsement, of said checks, and that the defendant bank had no knowledge or notice of the relations, if any, at the time or times mentioned, existing between the plaintiffs and said Pangle in the matter of the issuing, passing and endorsing of said checks, and further that the plaintiffs did not use ordinary care and prudence in the matter of its alleged dealings and transactions with said Pangle and in the matter of the issuing and delivery of said several checks, then the plaintiffs can not recover in this action and your verdict should be for the defendant.

"In determining this question, among other things to be determined in this case by you, and in arriving at your conclusion as jurors as to whether or not the plaintiffs exercised and used ordinary care in relation to their several transactions with said Pangle and said defendant relative to the issuing, delivering, passing and payment of said several checks, or any of them, you may take into consideration the length of time the evidence may show the plaintiffs to have had business relations with said Pangle and said defendant, and also the manner and method by which the plaintiffs treated and dealt with said Pangle and said defendant, and from all of the evidence and circumstances in the case determine as honest jurors whether or not the plaintiffs, as well as the defendant bank, were guided by the exercise of ordinary care and prudence in relation to the varied and numerous transactions shown by the evidence to have been had

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between the parties to the case, and between the plaintiffs and said Pangle. In arriving at your conclusion in this case, you may and you should consider, among other things, the character and nature of the transactions shown to have taken place by and between the plaintiffs and the man Pangle, and you may consider the nature of the transactions relative to the issuing and delivery of said checks, and whether or not said checks were charged to the account, if any existed, against said Pangle, upon the books or records of said plaintiffs, and use all such information as you may have at your command, based, of course, upon the evidence and circumstances in the case, to the end that equal and exact justice may be meted out to the parties to this action.

"I charge you that it is the depositor's duty, when his pass book has been written up and returned to him with the checks charged to his account, to examine them within a reasonable time thereafter and report any forgeries discovered.

"After the lapse of a reasonable time a presumption arises that the checks of the depositor issued against his bank are correct, and the depositor having failed to examine them at a proper time can not recover from the bank the amount paid on checks subsequently discovered to be forgeries without proving that the bank could have, by the use of ordinary care, detected such forgery.

"Could the plaintiffs, by the exercise or use and application of ordinary care, relative to and in the matter of these several alleged transactions about and concerning their dealing with said Pangle, and the issuing, passing and delivery of said several checks, have averted and avoided any or all of the alleged several crooked transactions on the part of said Pangle? Could the plaintiffs, by the use and exercise of ordinary care and prudence, have discovered any or all of the alleged several transactions, as shown by and from the evidence, and checked or averted the acts as alleged of Pangle in time to have saved any or all of the disaster that is alleged to have befallen the plaintiffs or the defendant bank?

"All these questions are matters of grave importance to the parties to this suit and must be solved and determined by you in the light of the evidence in the case."

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Thereupon the jury retired and in due time returned a verdict for the plaintiffs in the sum of \$2,630, with interest at 4 per cent from March 2, 1911, to November 4, 1912. Motion for new trial was filed by defendant and the same was refused and overruled by the court.

CONSTITUTIONAL LAW—INTOXICATING LIQUORS.

[Lawrence Common Pleas, June 17, 1913.]

IN RE BOYLE'S APPLICATION FOR REFUNDER OF LIQUOR TAX.**1. Act to Refund Liquor Tax for Enforced Discontinuance of Traffic Following March Floods Invalid for Retroactive Operation.**

The act of the General Assembly to provide for a refunder of portions of the tax on the traffic of intoxicating liquor in certain cases of enforced discontinuance of said traffic, (act of May 6, 1913) can not be made to operate retrospectively so as to apply to any such discontinuance occurring prior to the passage and approval of such act, for the reason that such application would offend against that portion of Art. 2, Sec. 28, Ohio Constitution, forbidding the enactment of retroactive laws.

2. Liquor Tax Refunder Act Operating Prospectively Invalid, Quaere. Whether said act is constitutional when operating prospectively, quaere.

[Syllabus by the court.]

MOTION to dismiss the application.

Lindsey K. Cooper, prosecuting attorney for the motion.

H. M. Edwards, O. E. Irish, J. O. Yates and Johnson & Jones, contra.

CORN, J.

The applicant, James F. Boyle, (with several others) applies to this court for an order upon the auditor of Lawrence county for a refunder of his liquor tax, covering seven days for an enforced discontinuance of business between March 28, and April 5, 1913, during which time his place of business was closed upon order of the mayor of the city of Ironton on the occasion of the disastrous flood which swept the Ohio valley at that time.

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The application was filed in this court on May 10, 1913, under favor of the Chapman act, passed April 18, approved May 6, 1913, and filed in the office of the secretary of state the very day this application was filed here.

The act provides in substance that when a person engaged in the traffic of intoxicating liquors is required by order of the military or other authority of the United States or of the state, county, municipality, or township, or by or through fire, flood, earthquake, or other public calamity to discontinue business temporarily, such persons shall be entitled to a refunder of a proportionate amount of the tax paid under Gen. Code 6071 *et seq.* based upon the number of days or fraction thereof, of enforced discontinuance.

The act then provides the procedure to be followed, and the applicant here files his claim in accordance therewith. The prosecuting attorney moves to dismiss the application "for the reason that under the law of Ohio the applicant is not entitled to the relief prayed in said application, or to any relief upon the facts set out therein."

It is contended in support of this motion that even if this act is constitutional, it can not be made to apply to enforced discontinuances consequent upon any of the causes enumerated in the act, occurring prior to its passage.

Whether this act is unconstitutional because of its belonging in the category of "class legislation," or for any other reason, it is not now necessary to decide, but we leave that question to be determined either by one of the higher tribunals, or upon a case wherein it is sought to apply its provisions prospectively. That the general assembly intended this act to operate retrospectively is quite clear from the language of the act itself: "The act shall apply to any such discontinuance of business in the assessment year beginning the fourth Monday of May, 1912. and thereafter."

And in an effort to make it an emergency act so as to defeat the referendum, the following language is used, some of which pronounces a most remarkable doctrine: "An emergency is hereby declared to exist, *by reason of the disastrous floods that have rendered the transaction of business in certain places im-*

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possible or unwise, and *for the preservation of the public welfare* it is necessary that this act be in immediate effect, etc.'” (Italics by the court.)

The reference to the results of the recent unprecedented floods leaves no room to doubt that the intention of the legislature in passing this law and declaring an emergency to exist so that the “Public welfare” required the act to be in immediate effect was that it should reach back to the discontinuances caused by the flood and afford traffickers in intoxicating liquors the relief attempted to be provided for in the act, where, it is conceded in argument, no remedy existed at the time of the discontinuances. The question is, therefore, presented whether it is within the power of the General Assembly so to legislate. I think not.

Article 2, Sec. 28, of the fundamental law of this state provides among other things: “The General Assembly shall have no power to pass retroactive laws,” and this law, if permitted to operate as requested by the applicant, would certainly offend against this inhibition of power.

It is argued that it is not every law that operates retrospectively that is unconstitutional; that is all very true, but the test is announced by Judge Bradbury in *Hamilton Co. (Comrs.) v. Rosche Bros.* 50 Ohio St. 103, 111 [33 N. E. Rep. 408; 19 L. R. A. 584; 40 Am. St. Rep. 653], as follows:

“If it creates a new right, rather than affords a new remedy to enforce an existing right, it is prohibited by this clause of the constitution of this state.”

Judge Story defines a retrospective, or retroactive law, as follows: “Upon principle, every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective.” This definition was approved by the Supreme Court in *Rairden v. Holden*, 15 Ohio St. 207, and adopted by the United States Supreme Court in *Sturges v. Carter*, 5 O. F. D. 428 [114 U. S. 511; 29 L. Ed. 240].

Now, in the light of these quotations, when it is sought to apply this law to transactions already past, how stands the

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case? Clearly, the act becomes retroactive and therefore not applicable to afford Boyle the relief sought or any relief, upon the facts presented in his application.

If we may fairly assume that the officials of the county have performed their official functions, "that that is done which ought to be done," then it follows that the entire tax for the year 1912 has been paid in and properly distributed, to wit: three-tenths passed to the credit of the general revenue fund of the state and paid into the state treasury; five-tenths paid into the treasury of the city of Ironton wherein the business is conducted; and the remaining two-tenths passed to the credit of the poor fund of this county. (Gen. Code 6093 and 6094.) Therefore, to require Lawrence county to bear all of the proposed refunder would certainly "create a new obligation" on the county and "take away or impair vested rights acquired" under the existing laws aforesaid. There could be "no surplus or unexpended funds" arising from this tax in the hands of the treasurer from which to pay the claim should it be allowed.

There being at the time of the discontinuance alleged no law in force providing for a refunder of a pro rata part of the liquor tax, and it being beyond the power of the General Assembly to enact legislation providing for a refunder for such past events, it follows as alleged in the motion, that under the law of Ohio, the applicant is not entitled to the relief asked, not to any relief upon the facts alleged.

The motion to dismiss is, therefore, granted and the application is accordingly dismissed at the costs of the applicant.

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CONTRACTS—INJUNCTION—MUNICIPAL CORPORATIONS.

[Franklin Common Pleas, January 7, 1913.]

EDWARD D. ROBERTS v. COLUMBUS (CITY) ET AL.

1. Contract Awarded to Bidder not Mathematically Lowest not Enjoined in Absence of Abuse of Discretionary Power in Municipal Officer.

The government of municipalities is reposed in municipal officers, not in the courts, and unless the discretionary power of the former is grossly abused courts will not interfere; hence, contracts for fire hose will not be enjoined because the bids accepted were not the lowest mathematically, nor because the contract was not awarded in its entirety to one bidder.

2. Contract not Enjoined Because Split Among Successful Bidders in Suit to Enjoin Contract with One.

A taxpayer's suit against a municipality and one of four successful bidders, to each of whom a part of a contract for fire hose had been awarded, will not lie to restrain the performance of the contract, with one because split and as being subversive of the principle of competitive bidding, since no consistent effort is made to enjoin the city from contracting with the other three bidders, and especially if the taxpayer is but a figurehead for an unsuccessful bidder.

INJUNCTION.

M. E. Thrailkill and *J. D. Kärnes*, for plaintiff.

Stuart R. Bolin, city solicitor, for defendant, City of Columbus.

Webber, Jones & McCoy, for defendant, Eureka Fire Hose Co:

Director of public safety had the authority and discretion vested in him to enter into contracts for the purchase of fire hose of various brands and makes for the purpose of comparative experimental tests without complying with Gen. Code 4328 requiring competitive bidding. *People v. Van Nort*, 64 Barb. (N. Y.) 205; *Baird v. New York*, 96 N. Y. 567; *Andrews v. Knox Co.* 70 Ill. 65; *Featherston v. Small*, 77 Ind. 143; *First Nat. Bank v. Barber Co.* 43 Kan. 648 [23 Pac. Rep. 1079];

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Lane v. Morrill, 51 N. H. 22; *Cleveland Fire Alarm Tel. Co. v. Fire Commissioners*, 55 Barb. (N. Y.) 288; *Ellis*, Mun. Code (5 ed.) p. 577; 3 *McQuillan*, Mun. Corp. p. 2696; *Yaryan v. Toledo*, 28 O. C. C. 259 (8 N. S. 1); *State v. Public Affairs (Bd.)*, 2 Circ. Dec. 428 (4 R. 76); *State v. St. Bernard (Vil.)*, 4 Circ. Dec. 224 (10 R. 74); *State v. Columbus (Bd. of Ed.)*, 10 Dec. Re. 314 (20 Bull. 156); *United States Wood Preserving Co. v. Sundmaker*, 186 Fed. Rep. 678 [110 C. C. A. 224]; *Scott v. Hamilton*, 29 O. C. C. 652 (7 N. S. 493); *State v. Hermann*, 63 Ohio St. 440 [59 N. E. Rep. 104]; *State v. Shelby Co. (Comrs.)* 36 Ohio St. 326; *McLaughlin v. Kneass*, 7 Phila. Rep. 634; *State v. Board of Pub. Serv.* 14 Dec. 715; *State v. Board of Pub. Serv.* 81 Ohio St. 218 [90 N. E. Rep. 389]; *Elliott*, Roads & Streets, p. 89, Sec. 725; *Montgomery Gas-Light Co. v. Montgomery*, 87 Ala. 245 [6 So. Rep. 113; 4 L. R. A. 616]; *Howard v. Clay Co. (Suprs.)* 54 Neb. 443 [74 N. W. Rep. 953]; *Des Moines Gas Co. v. Des Moines*, 44 Ia. 505 [24 Am. Rep. 756]; *Chicago v. Evans*, 24 Ill. 52; *Richmond v. Davis*, 103 Ind. 449 [3 N. E. Rep. 130]; 28 Cyc. p. 663; *Pullman v. New York*, 54 Barb. (N. Y.) 169; *Plessner v. Pray*, 8 Dec. 149 (6 N. P. 444); *Spelling*, Injunction Sec. 716; *Kelly v. Chicago*, 62 Ill. 279; *Mayo v. County Commissioners*, 141 Mass. 74 [6 N. E. Rep. 757]; *State v. McGrath*, 91 Mo. 386 [3 S. W. Rep. 846]; *Interstate V. B. & P. Co. v. Philadelphia*, 164 Pa. St. 477 [30 Atl. Rep. 383]; *Times Pub. Co. v. Everett*, 9 Wash. 518 [37 Pac. Rep. 695; 43 Am. St. Rep. 865]; *Page*, Contracts Sec. 1049; *State v. Rickards*, 16 Mont. 145 [40 Pac. Rep. 210; 28 L. R. A. 298; 50 Am. St. Rep. 476]; *Neff v. Stone Sand Co.* 108 Ky. 157 [55 S. W. Rep. 697]; *Spelling Inj. & Extra. Rem.* Sec. 676; *Sherlock v. Winnetka*, 59 Ill. 389; *Brown v. Concord*, 56 N. H. 375; *Patton v. Stephens*, 77 Ky. (14 Bush.) 324; *Roberts v. New York*, 5 Abb. (N. Y.) Pr. 41; *Warren Co. Agricultural J. S. Co. v. Barr*, 55 Ind. 30; *Dent v. Cook*, 45 Ga. 323; *Perry v. Kinnear*, 42 Ill. 160; *Heath v. Railway*, 61 Ia. 11 [15 N. W. Rep. 573]; *Morgan v. Binghamton*, 102 N. Y. 500 [7 N. E. Rep. 424]; *Torret v. Muskegon*, 47 Mich. 115 [10 N. W. Rep. 132; 41 Am. St. Rep. 715]; *Bacon v. Walker*, 77 Ga. 336; *High*, Extra. Rem. Secs. 42, 91, 92, 325; *State v.*

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Warmoth, 23 La. Ann. 76; *Boynton v. Elyria*, 19 Dec. 762 (8 N. S. 645); *McDermott v. Jersey City*, 56 N. J. Law 273 [28 Atl. Rep. 424]; *Shaw v. Trenton*, 49 N. J. Law 339 [12 Atl. Rep. 902].

This action is not brought in good faith by a bona fide taxpayer, but in the interests of a disappointment bidder, and therefore the injunction will not be allowed. *United States Wood Preserving Co. v. Sundmaker*, 186 Fed. Rep. 678 [110 C. C. A. 224]; *Ampt v. Cincinnati*, 15 Dec. 237 (2 N. S. 489); *Fergus v. Columbus*, 8 Dec. 290 (6 N. P. 82); *Hensly v. Hamilton*, 2 Circ. Dec. 114 (3 R. 201); *Knorr v. Miller*, 3 Circ. Dec. 297 (5 R. 609); *Brown v. Toledo*, 5 Circ. Dec. 115 (10 R. 642); *Gallagher v. Johnson*, 1 Dec. 264 (31 Bull. 24); *Vadakin v. Crilly*, 16 Dec. 719 (3 N. S. 609); affirmed, *Vadakin v. Crilly*, 28 O. C. C. 634 (7 N. S. 341), affirmed, no op.. *Vadakin v. Crilly*, 73 Ohio St. 380; *Reynolds v. Cleveland*, 13 Dec. 125; *Cincinnati v. Allison*, 12 Dec. 376.

The basis of this action is a mere irregularity, not involving moral wrong, and is not sufficient to warrant an injunction. *Caldwell v. Marvin*, 20 Dec. 715 (8 N. S. 387); *Columbus v. Bohl*, 13 Dec. 569 (1 N. S. 469); *Ampt v. Cincinnati*, 34 Bull. 112, affirming, no op., *Ampt v. Cincinnati*, 57 Ohio St. 669; *State v. Board of Ed.* 5 Circ. Dec. 447 (11 R. 41); *Bower v. Board of Ed.* 28 O. C. C. 624 (8 N. S. 305); *Sloane v. Railway*, 3 Circ. Dec. 674 (7 R. 85); *Friedman v. Cincinnati*, 13 Dec. 404; *Cincinnati v. Allison*, 12 Dec. 376; *Fergus v. Columbus*, 8 Dec. 290 (6 N. P. 82); *Hertenstein v. Hermann*, 9 Dec. 205 (6 N. P. 93).

BIGGER, J.

The case is submitted on an application of the plaintiff for a temporary injunction. The action is brought by the plaintiff in his capacity as a taxpayer to restrain the city and its officials, and the Eureka Fire Hose Manufacturing Company, from carrying out the terms of a contract entered into for the purchase of fire hose.

On the hearing quite a mass of testimony was taken, and the case has been argued at length by counsel, both upon the law and the facts. To entitle the plaintiff to the relief here

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asked of a temporary injunction, it must appear that upon the facts stated in the petition he will be entitled to the ultimate relief of a permanent injunction, provided the facts pleaded be established by the proof.

A great deal of testimony was taken upon the hearing as to the relative merits of the different kinds of hose which were bid upon as reflecting upon the plaintiff's claim that the carrying out of this contract will be a misapplication and misuse of the funds of the city. It is a well established rule of law that courts will not interfere with the actions of municipal officers clothed with a discretion of making contracts for a municipality, unless they amount to fraud or gross abuse of the discretion reposed in them by law. If the courts were to sit to hear and determine whether or not municipal officers who are clothed by law with certain discretionary powers had exercised them to the highest advantage of the city just as the officers themselves consider and determine these questions, the courts would have time for little else, and we would have government of municipalities by the courts, instead of by the officials of the municipalities. That would be to substitute the court's figurehead by which an unsuccessful bidder seeks to enjoin his poses in the city officials.

The rule is, therefore, well established that it is only where it is apparent that the official who is clothed with a discretionary power has grossly abused it, and has so acted that his act amounts to a fraud upon the municipality, that the court will interfere to restrain the exercise of such discretionary power.

After a careful consideration of the evidence touching the quality of the hose contracted for with the Eureka Fire Hose Manufacturing Company, I am satisfied that there was no such abuse of discretion on the part of the director of public safety as would warrant this court in interfering, if the director had purchased the entire amount of hose from the Eureka Fire Hose Manufacturing Company. Even to a nonexpert, the quality of this hose is manifestly superior to that of any other hose bid upon. Its advantages over the other hose which was offered in competition with it is clearly apparent. The officers of the fire department of the city all unite in saying that it is far

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superior to any other hose upon the market, and the testimony is overwhelming that its life far exceeds that of the other brands of hose, while at the same time affording greater security to life and property while it is in use. I am satisfied from the evidence that its life is practically twice that of the cheaper grades of hose. So far, therefore, from the evidence shown that an acceptance of the bid of the Eureka Fire Hose Company was an abuse of the discretion reposed in the director of public safety, I am of opinion the purchase of this hose, having regard to the relative merits of the different qualities of hose bid upon, was a wise and prudent exercise of the discretion reposed in him. The director was not required under the law to purchase from the lowest bidder. To do so might be, and often would be, very bad business policy. Clearly, therefore, had the director entered into contract with the defendant, the Eureka Fire Hose Manufacturing Company, for the entire amount of hose which he was directed to purchase, he could not be charged with any abuse of the discretion reposed in him.

As I understand counsel for the plaintiff, however, are not contending this, but rest their claim to the relief sought solely upon the ground that the director of public safety exceeded his authority when he split the contract instead of awarding it all in one contract. This, it is urged, would destroy competition, and would be subversive and destructive of the principle involved in competitive bidding.

As I view it, the plaintiff has not presented a case which calls upon the court to apply the doctrine contended for. The plaintiff has brought an action against the city authorities, and one of the four successful bidders, viz., the Eureka Fire Hose Manufacturing Company. There is no effort on the part of the plaintiff to restrain the city officials from carrying out the contract with the other three bidders who were awarded a part of this contract. Suppose the court should grant the relief prayed for? How would this enforce the principle contended for while the city authorities are left to carry out the contracts with the other three? If the plaintiff had really desired to do what his counsel contended for in argument, he would have done what was done in the case reported in *Boynton v. Elyria*, 19

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Dec. 762 (8 N. S. 645), brought his action to restrain the authorities from carrying any and all of the contracts and not a single one of them.

As I have already indicated, I see no reason whatever for holding that the director was guilty of any abuse of power, because he let this contract to the Eureka Fire Hose Manufacturing Company at a price higher than was bid by its competitors, because of the superior quality of its hose. Upon what principle of equity or justice then, which is the rule of action prescribed for the court in such cases, can the court enjoin one of these contracts, while allowing the others to stand? The court can not interfere because the contract price is too great, and the plaintiff has not sought to enforce the other principle contended for, because he has not made the other contracting parties defendants to this suit.

This leads me to suggest, although I would not undertake upon this preliminary hearing to absolutely decide it, if the decision turned upon that, that there is much in this case that points strongly to the conclusion that this taxpayer is but a figure head by which an unsuccessful bidder seeks to enjoin his successful rival, and the court will not lend its aid to any such effort. During a two days' hearing this plaintiff never appeared or manifested any interest in the case, while the agent of the Fabric Fire Hose Company was the only witness who did appear to manifest any interest in the suit. This conclusion is powerfully reinforced by the fact that the plaintiff has not sought to enjoin the contract with the Fabric Fire Hose Company, or the others, who were awarded a part of the contract for the hose, but apparently seeks to protect the other bidders in their contracts, while attacking the Eureka Fire Hose Manufacturing Company alone. In this state of the case, it is difficult to escape the conclusion that the real party prosecuting the case is the agent of the Fabric Fire Hose Company. But, however that may be, the plaintiff has not appealed to this court for any relief which will in any way be an enforcement of the principle for which alone he contends. I am of opinion the contract which is sought to be enjoined is a judicious one for the city, and there could have been no complaint by any one

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if the entire amount had been awarded to the Eureka Fire Hose Manufacturing Company, and as the plaintiff has not made any case here which calls upon the court to apply the principle contended for, that the director could not split up the contract, there is nothing in the case as presented which calls upon the court to grant the relief asked, either as preliminary or final.

For this reason the application for a temporary injunction must be denied.

DEATH—INJUNCTION.

[Hamilton Common Pleas, May 22, 1912.]

ELIZABETH EVANS V. ANNIE T. EVANS ET AL.

A Widow's Right to Cremate the Dead Body of Her Husband Sustained.

A widow as the heir or next of kin of her deceased husband is required by law to dispose of his body in a reasonable and sanitary manner; hence, if she elects, in conformity with his expressed desire to cremate his body, injunction will not lie against that method of disposal, where based only on sentimental objections to cremation on the part of other near relatives.

R. A. Black, for plaintiff.

DICKSON, J.

The plaintiff complained that the defendants were about "to cremate and consign to ashes the body of Frank B. Evans, recently deceased; that she and her family believe that the cremation of a body is contrary to religion and the will of God, and that unless restrained, the defendant will cause her to suffer irreparable injury; that cremation is not Christian burial and that she will suffer great distress of mind and anguish of spirit if the body of her brother were cremated and that she would lose her interest in her brother's body" and she asks for an injunction temporary, then final.

During the trial Nettie E. Bruce, a sister, testified:

"By Mr. Black—

"Q. State to the court, what is your name? A. Nettie E. Bruce, of Marion, Ohio.

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"Q. What relation are you to Frank B. Evans? A. A sister.

"Q. What relatives did Mr. Evans leave? A. What relatives did he leave? He left a sister, Mrs. Frank Mulvy, Miss Lizzie Evans and myself, and a Mrs. Clark of New York.

"Q. What attitude have you toward disposing of the body by cremation? A. I am very much opposed to cremation, not exactly on religious grounds, but it is the way our family feels on the subject."

Then Mrs. Annie T. Evans, the widow, stated to the court:

"My husband is to be cremated. It was his wish years ago, and on account of the way his father's body was buried and the bones taken up, he had a horror of being buried in the ground and having his bones scattered afterwards. Two years ago he said he wanted to be cremated.

"By Mr. Robert A. Black—

"Q. After the body is cremated, what do you expect to do with it? A. I will take care of the ashes in my home, as he requested me to do.

"Q. It was not your purpose to dispose of them in any cemetery? A. No, I intend to take care of them in my home as long as I live.

"By the Court—

"Q. Mrs. Evans, you have heard what these sisters say? A. Yes, sir.

"Q. Have you any objection to having him buried in the ground at their joint request? A. Yes, sir. I am carrying out his wishes. He had a horror of being put in the ground on account of the way his father's bones were taken up.

"Q. You are not willing to join with the sisters? A. No; I am going to carry out his wishes.

"Q. What are your wishes in the matter? A. Why, I want to have him put into a retort and cremated. I think it is the only sanitary thing to do and he felt in that way about it."

"What, Mr. Black, would you suggest should best be done under all the circumstances?"

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"I think that this body should be disposed of in such a manner that his relatives—his brother and sisters—may come to his grave. As Your Honor has seen, they are people advanced in life, that there is not much left to them except the memory of their dead, and it seems to me that they ought to be given that privilege.

"What is your opinion as a lawyer, Mr. Black, as to what is just and right—not a sentimental opinion, but as a lawyer?

"I believe that the court should have this body interred. The question of cremation has only been passed upon once and that is in an English report. You are asking purely as to law. The question of the direction of the decedent has been passed upon just once, and there the decedent left instructions for his body to be cremated. It was a case decided by the Lord Chancellor of England in 1896.

"What did he decide?

"The body was taken by force and cremated and the person doing it, and who was instructed by his last will to do that, brought suit to recover the expenses, and the court refused to allow him the expenses. The only case in Ohio is the one of *Herold v. Herold*, 16 Dec. 303 (3 N. S. 405). In that case the decedent requested that his body be interred at a place a very great distance from where he died. It was objected to by the widow and supported by the rest of the family. The court refused to carry out the request.

"What was the reason given for that decision?

"Because it was unreasonable under all the circumstances. The question of expense entered into that case.

"What do you mean by unreasonable?

"I mean that a body is not property, and it has been repeatedly held not to be property. There is an interest that may be had in it arising out of family ties. The widow is not the sole person having that interest. She can not keep out the rest of the family from their rights.

"Can they exclude her?

"No, they can not. It is the purpose of this widow to reduce that body to ashes and keep those ashes in the house. Now that in itself is startling.

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"Has the court anything to do with what is startling?"

"Other courts have had, Your Honor.

"We have no right to interfere with any one's conscience or religion. The body must be disposed of. If no one interested in kinship will do it, the public must. The public would have a right under some circumstances to give it to a hospital for dissection. Now, whose duty is it to dispose of this body, Mr. Black?"

"Your Honor can make the widow dispose of it.

"Then has not the widow the right to dispose of it?"

"Yes.

"Would she not have a right to dispose of it according to her religious or sentimental feelings?"

"She has not an absolute right.

"Has she not a right to dispose of that body as she pleases since it is her duty?"

"Would Your Honor say that she had a right to give this body to a hospital?"

"That question is not before the court. It is the duty of the widow to dispose of the body on sanitary grounds. Since the law provides it is the duty of the widow as heir or next of kin to dispose of the body, what right have I in this case to interfere? Would she not have a right to dispose of it as she pleases under the seventh section of the bill of rights—

"'No person shall be compelled to attend, erect or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given by law to any religious society; nor shall any interference with the rights of conscience be permitted.'

"How can I interfere with her right of conscience, unless that conscience should be of such kind and nature as to be against the law or public policy or the constitution?"

"'No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceful enjoyment of its own

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mode of public worship, and to encourage schools and the means of instruction.'

"Mr. Black: I am claiming that it will outrage the sensibilities of these sisters to have this body cremated.

"The Court: That is why I asked the widow if it would be possible for her to join in some agreement with the sisters. I had hoped, this being a matter solely of conscience, that we could get these good people together on the conscience matter and put this body on a lot, and so have the controversy ended. But since I am a judge and must decide according to the law, and since this body belongs to the widow for disposition and since it is her wish that it shall be burned, how can I interfere?

"Your Honor in passing upon the disposition of this body is going farther than any court heretofore to give the body either to the wife or sisters. You are going to shock the sisters in allowing this body to be cremated.

"The Court: Suppose you follow that out, Mr. Black. I have to shock the conscience of either Miss Evans and her sisters, or Mrs. Evans, the widow—the conscience of some one is bound to be shocked.

"Mr. Black: I do not recall that she said that she did make this a matter of conscience. She was in favor of cremation because it was sanitary and she had protested against burial in the ground.

"The Court: And Mr. Evans had requested it beforehand, and she regards it from her standpoint as the proper disposition of dead people.

"Mr. Black: We not only asked for an injunction, but we ask for such further rights as we may be entitled to in law and equity. My clients rights as we may be entitled to in law and equity. My clients have been absolutely excluded from paying tribute of affection to the remains of their brother. It was this widow's purpose to have quickly taken this body and consumed it to ashes and then kept the ashes about the house. I feel that the court—there is no question but that the court can, and I feel that the court ought to require that the interment of this body be so deep that the conditions that the widow complains of as to the future would not happen. It ought to be on the con-

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science of this court to require the interment of this body, but make the condition that it would be interred in such a way that no occasion of having the bones exposed, as Mrs. Evans testified to on the stand, would arise. How can this court in any decency or justice allow this widow to cremate this body and keep the ashes around the house like a piece of bric-a-brac. I think that would be carrying the proposition down to the point of ridicule.

"The Court: How can I interfere with the morality or the right of conscience of any one so long as the law is not broken? The widow is required to dispose of the body, therefore she has some ownership in it—a duty to perform. She may dispose of it in any way she sees fit, so long as she does not violate the law. Suppose the wife desired interment in the ground and the sister desired cremation, what would you say should be done in that case?

"Mr. Black: I would say that Your Honor could not order cremation. It is unusual—because cremation is extraordinary—it is a freak.

"The Court: Why do you call it unusual, Mr. Black? In other days it was the only method of disposing of the dead.

"Mr. Black: There was a case—a famous case—a leading case in America, upon what are property rights, *Ruggles, In re*, 4 Bradf. (N. Y.) 503, and I fail to find a case reported where a question of the dead arose, in which that case was not cited as a leading authority as the development of the attitude of the law on that subject. I want to read from that case:

"The right to the repose of the grave necessarily implies the right to its exclusive possession. The doctrine of the legal right to open a grave in a cemetery after a certain lapse of time, to receive another tenant, however it may be sanctioned by custom in the English church yards or by continental usage at Pere-La-Chaise, and elsewhere, will hardly become acceptable to the American mind; still less the Italian practice of hastening the decomposition of the dead by corrosive elements.

"The right to the individuality of a grave, if it exists at all, evidently must continue so long as the remains of the occupant can be identified—and the means of identifying can only

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be secured and preserved by separate burial. The due and decent preservation of human remains by separate burial, is pre-eminently due to Christian civilization, which bringing in the coffin and the sarcophagus, superseded the custom of burning, and "gave" in Lord Stowell's vivid phrase, "final extinction to the sepulchral fires."²

"That was written by a man who was esteemed as considerable of a scholar in America.

"The Court: I will have to hold, Mr. Black, that the body primarily belongs to the government. No body can be disposed of by any one without a permit from the proper authority. After the public is through with the body, where does it go? It goes, as far as right is concerned, to the person whose duty it is to dispose of it. The widow here is the heir of the decedent. To prevent the authorities from taking it, the widow must dispose of it. If she see fit to take that method of burial which suits her and does not enter into conflict with the laws of Ohio, she has a right to exercise her wish according to her own conscience—her own religious or moral beliefs. It is unfortunate that these sisters' feelings and consciences will be shocked by disposing of the body by cremation, but since it is not illegal and the law does not prevent it, this court can not interfere.

"The court will order that an opportunity be given before incineration for the next of kin to see the body."

RECEIVERS—TAXATION.

[Hamilton Common Pleas, July 29, 1912.]

IN RE PATENT WOOD KEG COMPANY.

Receiver of Dissolved Corporation Required to Return and Pay Taxes on Personal and Real Property in his Hands as Such.

A receiver of a corporation in process of dissolution represents the owner; and, notwithstanding such office is not designated among those who shall list property for taxation by Gen. Code 5370, 5372, 5328, he is required to return personal property in his hands as such under Gen. Code 11945 and real estate belonging to the corporation and to pay taxes due and to become due thereon for the current calendar year.

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Paxton, Warrington & Seasongood, for the receiver.

Thomas L. Pogue, Pros. Atty., *John V. Campbell* and *Charles A. Groom*, Asst. Pros. Attys., for *William A. Hopkins*, Treas.

DICKSON, J.

All the property, real and personal, belonging to the Patent Wood Keg Company under the provisions of Gen. Code 11938 and certain steps taken in this court and particularly the decree of dissolution of date February 7, 1912, is in the hands of a receiver—subject to the order of court.

The treasurer of Hamilton county has made application to require the receiver to pay taxes on the real estate for the year 1912, and return all of the property in his hands subject to taxation for the year 1912 and to retain sufficient money to pay the taxes thereon, and the receiver asks this court for advice in the premises.

From Gen. Code. 5328, 5370, 5372 and 5375 it is clear that all personal property in Ohio not specifically exempt is subject to taxation.

Under Gen. Code 11943 a receiver was appointed and the corporation ceased to exist February 7, 1912. Under Gen. Code 11945 the receiver became vested with all the assets of the corporation from the time of filing his bond February 9, 1912, and was thereafter trustee of this estate for the benefit of the creditors and stockholders of the corporation, with all the powers conferred by law upon trustees to whom assignments are made for the benefit of creditors. This corporation with all its assets—real and personal—is in this court for the purpose of being settled. The court, through its receiver, takes the place of the corporation. The receiver is in effect the corporation.

Our Supreme Court in *McNeill v. Schott*, 51 Ohio St. 255 [37 N. E. Rep. 526; 23 L. R. A. 628], has held that personal property held by an assignee of an insolvent debtor whose estate is being settled in the probate court is not subject to taxation.

Must personal property held by a receiver of a corporation

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in process of dissolution, of being settled in this court, be duly returned by the receiver and be subject to taxation?

Gen. Code 11945 provides:

"Such receiver shall be vested with all the estate, real or personal, of the corporation, from the time of his filing the security required by law, be trustee of such estate for the benefit of creditors of the corporation and its stockholders, and have all the powers conferred by law upon trustees to whom assignments are made for the benefit of creditors."

For taxation purposes are receivers of corporations in dissolution to be treated like assignees of insolvent debtors? The powers are the same—both are trustees. As a general rule all trustees pay taxes on trust property. Gen. Code 5370.

Gen. Code 5372 provides:

"Personal property of every description * * * shall be listed in the name of the person who was the owner thereof on the day preceding the second Monday of April in each year."

The Supreme Court had before it the above when it decided the McNeill, assignee, case. That court evidently considered the creditors the owners. In an assignment being settled in court it is the duty of the creditors to return and not the duty of the assignee. It would be necessary for this court to follow that holding as to assigneeships. But how stands this case?

In an assignment there is a grant. The grantor ceases to be the owner, his only interest being a contingent remainder.

In this receivership there is no grant. Whatever vesting there is is for control only. The corporation is still the owner and remains the owner until final distribution. The property still exists. Had certain court proceedings not been taken the property would be returned by the corporation even though insolvent. The mere change of name—corporation to receiver—would not make or unmake double taxation. The court, and through it the receiver, stands in the shoes of the owner.

Gen. Code 5370 provides:

"Each person of full age and sound mind shall list the personal property of which he is the owner * * * the prop-

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erty of corporations whose assets are in the hands of receivers by such receivers."

The word assignee is not in this section. This court does not believe that such an omission is significant, but that the omission was due rather to carelessness—that to all intents and purposes the word assignee should be read into the statute or put there by the general assembly. However, receivers are not omitted. Thus reason and the law both require the receiver to return and to pay.

The decision in the McNeill, assignee, case is not altogether satisfactory. The gist of that decision is that the assets of the assigned estate were "being settled." The question at once arises, what is meant by "being settled"?

Our Supreme Court in *French v. Bobe*, 64 Ohio St. 323 [60 N. E. Rep. 292], in distinguishing the McNeil case, say that Bobe, assignee, should return because with the consent of all and with the approval of the court, Bobe, assignee, was conducting the business for profit, not to pay the debts.

The court in the Bobe, assignee, case at page 341, say:

"As a general rule it may be stated that there is no sound principle upon which the property of a person or corporation in the hands of a receiver to be managed for the interests of those concerned, can be regarded as exempt from the burden of taxation."

The assignee or the receiver—both are trustees—must return the property in their care for taxation in their names as trustees.

Gen. Code 5370 " * * * The property of a person for whose benefit property is held in trust by the trustee."

Our Supreme Court in *McNeill v. Schott*, *supra*, say that when property in the hands of an assignee is "being settled," that as the creditors return this property, therefore the assignee need not return it for taxation. In *French v. Bobe*, *supra*, the same court say that the estate was not being settled, therefore the assignee must return for taxation.

Quaere—Is any estate in any court rightly, except when in the condition or state of being settled?

To require the creditors of a concern in the hands of the

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court to return their claims for taxation is productive of neither good morals nor much money.

The receiver herein will be required to return the personal property of his estate as of the day preceding the second Monday of April, 1912. He will also be required to pay the taxes on the real estate for the year 1912. The real property held by the receiver is subject to taxes on the day preceding the second Monday of April, 1912, and will be paid by him as receiver. The receiver will also pay the last half of the taxes for the year 1911, due June, 1912.

CORPORATIONS.

[Cuyahoga Common Pleas, January 28, 1913.]

STATE BANKING & TRUST CO. V. MATTIE MITCHELL CO. ET AL.

1. **Statutory Liability of Stockholder upon Formal Surrender of Stock and Acceptance by Board of Directors before Indebtedness Accumulated.**

A stockholder, under the rule of evidence established by Gen. Code 8686, 8687 (R. S. 3258) in fixing the liability of stockholders, having formally released and surrendered his certificate of stock in a solvent company by and with the approval of each and all its directors and delivered the same to the secretary for transfer to the corporation before the accumulation of an indebtedness and prior to the amendment of such statute, is released from liability as a stockholder even though the secretary fails to record the transfer as provided by Gen. Code 8673 (R. S. 3254) and the company subsequently becomes insolvent, especially since no investigation of stockholders is asserted or proved. *Harpold v. Stobart*, 46 Ohio St. 397, denied.

2. **Bona Fide Purchase of Its Own Stock by Solvent Corporation not Ultra Vires.**

A corporation does not act ultra vires in the purchase of its own stock, where no question arises as to the good faith of the parties, and the transaction has been fully executed, and the company at the time was free from debt, and the purchase was made to avoid loss to the company through the resistance of the dissatisfied holder against the securing of loans for the purpose of entering the business, and the transaction has passed unquestioned for a long period; and a stockholder so surrendering his stock is not subject to a continuing statutory liability.

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Smith, Taft & Arter and Bacon & Clay, for plaintiff.

E. K. Wilcox, for defendants.

COLLISTER, J.

The above entitled action was brought to subject divers defendants, claimed to be stockholders of the Mattie Mitchell Company, to the payment of the statutory liability, so-called. The case was referred to a referee, and on October 14, 1912, he filed his report in this court. The matter is now before the court on a motion to confirm the report by the plaintiff, and on exceptions to the report by the defendant George A. Stanley.

The question was tried before the referee on an agreed statement of facts. A decision by this court means a review of the conclusions of law as found by the referee from such agreed statement of facts. The facts of said agreed statement, so far as I deem them essential to the questions at bar, are as follows:

The said The Mattie Mitchell Company had an authorized capital stock of \$50,000, divided into 500 shares of \$100 each; that H. E. Williams was president, director and general manager of said company, and C. T. Denley was its secretary, during all the times involved in said action; that prior to April 10, 1901, the Mattie Mitchell Company was engaged in the manufacture and sale of a certain food product known as "The Mattie Mitchell Self-Rising Flour"; that said food product was a new and untried variety, for which there was little or no market or demand; that on April 5, 1901, said company increased its capital stock from \$30,000 to the \$50,000 aforesaid; and on said date said company, by its board of directors, authorized, empowered and directed its president and secretary to sell said 200 shares of said increased capital stock, for the purpose of providing money for advertising and creating a demand for said food products; and, pursuant thereto, said company, through its said president and secretary, proposed and offered to issue to the defendant George A. Stanley, 30 shares of its capital stock, at the par value of \$100 per share; and on April 10, 1901, said company issued and delivered to said George A. Stanley 30 shares of its capital stock, for which he paid to said company the sum of

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\$3,000; that the following is a true copy of stub No. 3 of the stock certificate book of said company, said stub No. 3 being the one from which the certificate for said 30 shares was detached and issued to said George A. Stanley, to-wit:

“Certificate
No. 3
for thirty (30) shares
issued to
George A. Stanley,
dated April 11, 1901,
from whom transferred
dated, 1901..
No. original, No. original, No.
of shares
Certificate shares transferred
Received certificate No. 3,
for thirty (30) shares,
this 10th day of April, 1901.
George A. Stanley.”

That the certificate for said thirty shares was in fact issued to said George A. Stanley on April 11, 1901, and the entries on said stub No. 3 were in fact made on or prior to April 11, 1901, and the receipt therein contained was signed by said George A. Stanley on April 11, 1901, and the certificate for said thirty shares was in fact received by said George A. Stanley on April 11, 1901; that said company kept no “stock ledger” or book in which was recorded the issue or transfer of stock certificates, other than the “stock certificate book” from which the certificate aforesaid was detached, and of which said stub remained a part.

Said agreed statement of facts contains the following as a part thereof:

“It is further agreed that George A. Stanley and H. E. Williams would testify as follows, and said statements are admitted and received in evidence subject only to the objection by plaintiff that the statements and representations made by the officers of the company are not binding upon the company,

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and are without legal effect as against the plaintiff and other creditors of said the Mattie Mitchell Company." (Such objection was not urged, or even suggested, on the hearing on the above motions; so it is fair to say it has been abandoned.)

"That on and prior to April 10, 1901, and for the purpose of raising money for advertising and creating a demand for the self-rising flour, to be manufactured by said company, the directors of the Mattie Mitchell Company had resolved to issue and sell a portion of its authorized but unissued stock, and for the purpose of inducing said George A. Stanley and Jessie McMath Stanley, a defendant, to purchase said stock, the president and secretary of said company represented to said George A. Stanley and said Jessie McMath Stanley that said Company could and would obtain the entire amount of money required for said purpose from the sale of its unissued capital stock. That inasmuch as said business was largely experimental in character, said company would conduct its business entirely with and within its paid-in capital, and that it would not enlarge or increase its expenditures or obligations beyond its said capital, and that in no event would said company obtain credit or borrow money for the purpose of carrying on its business, or for advertising and creating a demand for its product. That on April 10, 1901, said George A. Stanley and Jessie McMath Stanley agreed to purchase 50 shares of said stock (George A. Stanley to purchase 30 of said shares and Jessie McMath Stanley 20 thereof), and that in so doing they each relied upon the representations and promises made to them as aforesaid, and would not have purchased said stock if said representations and promises had not been made to them; that thereupon, on April 11, 1901, said company issued and delivered to said George A. Stanley 30 shares of its said capital stock, and 20 shares thereof to Jessie McMath Stanley, for which they paid to said company the sum of \$5,000. That afterwards, and at the time when said company had expended a large amount of money in advertising, and had exhausted its means for further conducting its business, said company, by its officers and directors, determined and attempted to borrow a large sum of money, to be expended in further advertising said food product, and paying the expenses

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of carrying on the business, all of which was in violation of the representations and promises made to the defendants George A. Stanley and Jessie McMath Stanley, as above set forth. Thereupon said defendants George A. Stanley and Jessie McMath Stanley objected and protested to the stockholders and directors, and to the bank from which said loan was to be obtained; and, further protesting, said defendants George A. Stanley and Jessie McMath Stanley notified said bank not to make said loan, and notified the officers of said company that if they persisted in their efforts to obtain said loan, said defendants George A. Stanley and Jessie McMath Stanley would apply to the court for the appointment of a receiver for said company, and for an injunction restraining it and its officers from making or obtaining said loan. Thereupon, and for the purpose of avoiding loss to said company and adjusting said controversy whereby it might be able to contain its business, said company, by its officers and directors, then and there agreed to receive back its said shares of stock and return to said defendants George A. Stanley and Jessie McMath Stanley the amounts of money they had paid therefor, without use or diminution thereof, and regardless of the result of the business while said stock had been held by those defendants; and pursuant to said agreement, on August 29, 1901, said George A. Stanley, in good faith, released and surrendered said 30 shares of stock to the company by a writing on the back of the certificate representing said stock, properly signed and witnessed, and delivered the same to the secretary of the company, and requested that said release and surrender be properly entered on the books of the company."

It is further agreed in said statement of facts that the action of the officers of said company, in receiving said stock and paying said money to said Stanleys was afterwards unanimously approved, ratified and adopted by the board of directors, and by each and all of the stockholders of said company.

It is further agreed that the following record appears on the record book of said company:

"Directors' meeting. Cleveland, Ohio, March 18, 1902. There was held this day, at the office of the company, a meeting

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of the board of directors, there being present Messrs. H. E. Williams, A. C. Moss, M. M. Williams and C. T. Denley.

"The president called the meeting to order at 1 o'clock.

"Minutes of the last meeting were read and approved.

"The secretary read a letter from Mr. George A. Stanley tendering his resignation as a director of the company. Mr. Moss moved it be accepted, and the motion was seconded by Mrs. Williams, and was duly carried.

"Mr. Moss moved that Mrs. Denley be elected a director of the company, to fill the vacancy caused by Mr. Stanley, and the motion being seconded by Mrs. Williams, carried.

"Mr. Moss then offered the following preamble and resolution:

"Whereas, Mr. George A. Stanley did on August 27, 1901, not only decline to assist the company in borrowing money to carry on their business, but did further announce to the officers of the company that he would oppose in every way in his power the borrowing of any money whatever by the company, even to the extent of carrying the company into court if necessary, for the purpose of preventing its borrowing money, and otherwise announced that he was utterly opposed to the views and plans of the officers of the company, in the prosecution of its business, and that he is and would be a stumbling block in their way, and that it was his opinion that they had better buy him out, giving them notice that if they did not buy his stock at once, he would peddle it on the street; upon consultation, the officers of the company decided that it was desirable and necessary to at once buy the stock standing in the name of George A. Stanley and Jessie McMath Stanley, which purchase they made within a very few days thereafter; now, therefore, be it

"Resolved, that the action of the officers of the company in so purchasing the stock standing in the names of George A. Stanley and Jessie McMath Stanley, and their further action in making a promissory note of the company for the purpose of borrowing money to pay for said stock, be, and is hereby, approved and authorized by the board of directors of the Mattie

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Mitchell Company, and that said preamble be further spread on the minutes of the meeting.'

"Motion was seconded by Mr. Williams, and vote being taken, the following directors voted aye: H. E. Williams, M. M. Williams, A. E. Moss and C. T. Denley. There being no negative vote, the resolution was unanimously carried.

"The above preamble and resolution having been submitted to Mrs. L. F. Denley, she, as a director and stockholder of the company, approved the same.

"Mr. Denley moved that the president and treasurer of the company be authorized to make a loan, at bank or otherwise, for a sum not to exceed \$15,000; and to execute a promissory note or notes of the company for said purpose, upon such terms as they may be able to effect, for the prosecution of its current season's business.

"There being no further business, the meeting adjourned.

"C. T. Denley, Secretary."

It is also agreed in said agreed statement of facts that when the books and papers of said company came into the hands of the receiver, (the record of this court shows that a receiver was appointed on the day of, 190...), among other papers was an envelope on the outside of which was written: "Treasury stock of the Mattie Mitchell Company, formerly issued to George A. Stanley and Jessie McMath Stanley," and which envelope contained the two certificates referred to above. That on February 27, 1904, an involuntary petition in bankruptcy was filed against the Mattie Mitchell Company, and said company was afterwards duly adjudged a bankrupt, and said bankrupt estate has been duly administered and settled. That the trustee in bankruptcy took possession of all the property and assets of said company, and that said assets and property were insufficient for the payment of the secured debts of said company, there was nothing to pay a dividend to the general creditors and no dividend was paid to them, and that there were no funds with said trustee to be applied on the indebtedness of the company, and said company has ceased to do business, and has no property.

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It is further admitted in said agreed statement of facts that on August 29, 1901, said company was entirely solvent, and that each and all of the claims and debts represented in this proceeding were incurred and created at times long subsequent thereto.

It is further agreed that all the stockholders of said company, except George A. Stanley and Jessie McMath Stanley, (and Lavina Denley, who had owned one share, but had duly and legally transferred it to C. T. Denley, an insolvent person) were and are insolvent, and no money can be had from any of them.

It is further admitted that there are debts of the company incurred and created long subsequent to August 29, 1901, and sufficient in amount so that if George A. Stanley is held to be a stockholder, the amount of the statutory liability thereon should be collected and applied to the payment thereof.

There is a schedule of claims attached to the agreed statement of facts, which schedule it is agreed is correct, and which shows that none of the indebtedness was incurred prior to August 29, 1901, or prior to March 12, 1902, the date of the meeting of the directors above quoted.

The plaintiff claims George A. Stanley should be held to be a stockholder,

(1) because the transfer by him was never entered upon a stock ledger or similar book, and the stub of the certificate book showed the stock was issued to him, and there is no further entry in any book of the company in reference to said stock;

(2) because the act of the company in acquiring his stock was *ultra vires* of the company, and therefore void; and George A. Stanley, by reason thereof, continued to be and was in law thereafter a stockholder.

The defendant claims he was not a stockholder after August 29, 1901, because

(1) the stock was released and surrendered to the company by "a writing on the back of the certificate representing the stock, properly signed and witnessed"; and

(2) the acquiring of the stock by the company was not *ultra vires* of the company; and

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(3) that the circumstances and facts that induced the surrender of the stock by said Stanley on August 29, 1901, and the acquiring of it by the company, were such as to take the transaction out of the general rule, if there be such a rule in Ohio, forbidding a company to buy its own stock, and was therefore valid, and said Stanley ceased to be a stockholder from said date.

There is another question in the case, to wit, if the court finds said Stanley to be a stockholder, from what time should interest be computed on his liability?

We will try to take up these questions in the above order:

Art. 13, Sec. 3, of the constitution of the state of Ohio, 1852, reads as follows:

“Dues from corporations shall be secured by such individual liability of stockholders and other means as may be prescribed by law; but in all cases each stockholder shall be liable, over and above the stock by him or her owned and any amount unpaid thereon, to a further sum at least equal in amount to said stock.”

For a long time prior to April 10, 1901, Rev. Stat. 3258 (Gen. Code 8686, 8687) read as follows:

“The stockholders of a corporation which may be hereafter formed, and such stockholders as are now liable under former statutes, shall be deemed and held liable, in addition to their stock, in an amount equal to the stock by them subscribed, or otherwise acquired, to the creditors of the corporation, to secure the payment of the debts and liabilities of the corporation. (52 O. L. 44, Sec. 78, S. & C. 310.)”

Rev. Stat. 3259 (Gen. Code 8689) reads as follows:

“The terms ‘stockholders,’ as used in the preceding section, shall apply not only to such persons as appear by the books of the corporation to be such, but to any equitable owner of stock, although the stock appears on the books in the name of another.”

In 1889 the Supreme Court, in *Harpold v. Stobart*, 46 Ohio St. 397 [21 N. E. Rep. 637; 15 Am. St. Rep. 618], says in the syllabus:

“Where, in such case, the vendor causes an entry of transfer to be made by the secretary of the company, in a book then

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present at the company's office other than the stock book, with the expectation that it will be entered in another book then at the residence of the secretary, but no transfer is made in the stock book of the company, and, at the time of the accruing of the debts of the corporation, and at the time of the trial, such vendor appears, by the stock book, to be the owner of the shares, such entry of transfer is not sufficient to relieve the vendor of liability to the creditors of the corporation, notwithstanding the fact that the sale was made in good faith and for value, and that the vendor believed he had done all that was necessary to effect a transfer of the stock, and the further fact that the company thereafter treated the purchaser as the owner of the stock so sold."

In the opinion, the court cites Rev. Stat. 3259 as the authority for the decision.

While I am aware that a nisi prius court should be loath to question a decision of the Supreme Court, yet the nisi prius court must not let a Supreme Court decision, especially where such decision does not make a rule of property, become so overshadowing as to blind his reason. With all due deference to the court deciding the case of *Harpold v. Stobart*, *supra*, I am of the opinion that such court misinterpreted said Rev. Stat. 3259. That statute must be construed in connection with Rev. Stat. 3254 (Gen. Code 8673), which reads as follows:

"Stockholders shall be entitled to receive certificates of their paid-up stock in the company; and the president and secretary of the company shall, on demand, execute and deliver to a stockholder a certificate showing the true amount of stock held by him in the company; and it shall be the duty of the directors of said corporation, when organized, to keep a record of stock subscribed and transferred, and of the secretary or recording officer of such corporation to register therein the subscriptions and transfers of stock. For that purpose a book shall be kept; and whenever any certificate or certificates of stock are assigned and delivered by a stockholder, the assignee thereof shall be entitled, on demand, to have the same duly transferred upon said book by such secretary or recording officer, whose duty it shall be at the same time to enroll therein also

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the name of such assignee as a stockholder; and the books and records of such corporation at all reasonable times shall be open to the inspection of every stockholder."

When Rev. Stat. 3259 is read in such connection, it must be clear that the "book" therein mentioned was the "book" provided for in Rev. Stat. 3254, and the purpose of the section was to hold the actual stockholder, though the stock actually owned by him appear in such book in the name of another, and was not enacted for any other purpose; surely not for the purpose of making one a stockholder who was not in fact a stockholder.

This view of said decision I find strengthened when I read the case of *Herrick v. Wardwell*, 58 Ohio St. 294 [50 N. E. Rep. 903], in the opinion of which, on page 311, the court, in passing on this same question, cites said Rev. Stat. 3254 as a statutory authority in holding the same way as did the court in the Harpold case, and decides the question without citing said Harpold case as an authority therefor.

In 1898, while said Rev. Stat. 3254, 3258 and 3259 were as above quoted, the Supreme Court decided *Herrick v. Wardwell*, *supra*. Paragraph 3 of the syllabus of that case reads as follows:

"The stockholders of a corporation whose names appear on the stock book, or in the absence of such book, on stubs of stock certificates, as holders of stock are subject to a stockholder's liability for debts incurred by the corporation while such names are allowed to so remain. To avoid such liability, it must appear on the stock book in the one case, or on the stub of the stock certificate in the other, that the stock has been transferred to some one else."

So much of the facts of that case as would make the opinion intelligible are as follows:

"The Cleveland Dairy and Transportation Company was organized and incorporated under the statutes of this state, as a corporation for profit, in December, 1891, with a capital stock of \$20,000, the shares of stock being \$50 each. The defendants in error, J. W. Wardwell, L. G. Kies and W. W. Whitacre, became stockholders when the company was organized, J. W. Wardwell subscribed and paid for seventy shares of stock, and re-

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ceived a stock certificate therefor, and the stub of the certificate showed that he held the seventy shares of stock. In like manner Mr. Kies and Mr. Whitacre subscribed and paid for five shares of the stock each, and received like certificates, the stubs showing the number of shares held by each. The remainder of the stock subscribed for by others was evidenced by like certificates and stubs, but no stock book, other than the stubs and stock subscriptions, was kept by the company.

"During the months of February and March, 1892, the company made a large number of contracts with the milk producers located within convenient distance of Cleveland where the company had its place of business. The contracts were upon printed forms prepared by the company, and differed only in dates, amounts, and names, etc. The following is a copy of the contract entered into with P. B. Nichols, and the others are in legal effect the same: * * *

"On August 22, 1892, said J. W. Wardell sold, assigned and transferred his seventy shares of stock to his son, and a certificate was issued to the son for the stock, and the stub of the certificate to the son showed that the stock came from his father, but the stub of the certificate issued to the father did not show that the stock had been transferred to the son. On August 30, 1892, Mr. Kies and Mr. Whitacre sold, assigned and transferred their stock to one, D. W. Holbrook, and certificates of stock were issued to him, and the stubs were the same as in the case of Mr. Wardwell.

"On December 15, 1892, the company made an assignment for the benefit of its creditors, and thereafter this action was commenced by Newton Herrick, a creditor, in behalf of himself and all the creditors of the company, against the stockholders of the company, including said J. W. Wardwell, W. W. Whitacre and L. G. Kies, seeking to collect the statutory liability, for the benefit of all the creditors of the company.

"Wardwell, Whitacre and Kies answered setting up the sale and transfer of their stock at the dates above mentioned.

"Deliveries of milk continued under said contracts until the date of the assignment on December 15, 1892, and at that time the company owed about \$13,000 for milk delivered during the months of November and December, 1892. The milk delivered

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before the transfer of the stock by Mr. Wardwell, Mr. Whitacre and Mr. Kies, was all paid for before the assignment.

"The assignees of the Wardwell, Whitacre and Kies stocks conceded their liability, but as they were insolvent, and as nearly all of the other stockholders proved insolvent, it required the full amount of the statutory liability of all the solvent stockholders, including Wardwell, Whitacre and Kies, to pay the debts and costs of suit, and therefore the creditors insisted that they had the right to collect double liability from all who were stockholders at the time the milk contracts were entered into with the company.

"A referee was appointed in the court of common pleas. Upon appeal the case was heard in the circuit court, the parties agreeing as to who the creditors were, and the amount due to each. The circuit court in its judgment found the names of all the creditors, and the amount due to each as agreed upon, and found the amount due from each stockholder and rendered judgment therefor against such stockholder, and appointed a receiver, and ordered that the amounts for which judgment was rendered against the several stockholders should be paid to the receiver, and that he should pay the costs and fees out of the fund, and distribute the balance *pro rata* among the creditors. The circuit court held that the stockholders who had transferred their stock were liable only for the milk delivered under the contracts before the assignments of stocks were made, and there being some debts due from the company before the transfer of said stocks, the circuit court rendered judgment against J. W. Wardwell for \$347, against W. W. Whitacre for \$21.85, and against L. G. Kies for \$21.85, as the amount to be contributed by each toward the payment of said debts so due before said transfer of their respective stocks; but the circuit court refused to render judgment against said Wardwell, Whitacre and Kies, to increase the fund to be applied to the payment of the debts for milk delivered after the transfer of their said stocks.

"The plaintiff below, plaintiff in error here, in behalf of himself and the creditors of the company, excepted to the finding and judgment of the circuit court, so far as concerned the liability of said Wardwell, Whitacre and Kies; and also in behalf of

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himself and said creditors, filed a motion for a new trial, which was overruled, to which said plaintiff in behalf of himself and said creditors excepted.

"Thereupon the plaintiff in error, for himself and all the creditors of said company, filed his petition in error in this court, seeking to reverse and modify the judgment of the circuit court so rendered against said Wardwell, Whitacre and Kies, claiming that said judgment is too small."

After deciding some other matters, the Supreme Court, in its opinion, says: (beginning on page 308)

"Next it is urged by defendants in error that the debts for milk delivered under the contracts, accrued, not at the date of the execution of contracts but at the time of the delivery of the milk.

"The language of the constitution, Art. 13, Sec. 3, is as follows:" (The same as hereinbefore quoted)

"Rev. Stat. 3258 reads as follows:" (The same as hereinbefore quoted)

"Stockholders are liable to secure the payment of the 'dues' from corporations, as well as the 'debts and liabilities' thereof. The liabilities mentioned in the statute are to the 'creditors' of the corporation, but in the constitution 'creditors' are not named. The word 'creditor' cannot have the effect to limit or narrow the words 'dues, debts and liabilities.' Whoever has a claim against a corporation which falls within the terms 'dues, debts and liabilities' is a creditor of such corporation within the meaning of the constitution and statute under consideration.

"When the corporation executed these milk contracts, it thereby incurred a liability to pay for all the milk which should be shipped under said contracts. Whether an end could have been put to this liability by the corporation before the expiration of the time limited in such contracts, we need not now inquire. It is enough to say that no attempt was made to avoid the contracts, and that the shipment of milk continued under the contracts until the corporation made an assignment. The liability of the contracts for the debts arising from the delivery of milk thereunder, therefore, accrued at the time of the signing of the contracts, and under the authority of *Brown v. Hitchcock*, 36

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Ohio St. 667, the defendants in error remained liable on their stock for the milk shipped after they assigned their stock to insolvent persons."

The court, though it found the defendants liable for the reasons just stated in its opinion, proceeds further and holds the defendants liable for a further reason. It is found in the following language in the opinion, beginning on page 310:

"But the defendants in error are liable also upon another ground, even though it be conceded that the debts or liabilities for milk did not accrue until the delivery of the milk. It is conceded that they were stockholders when the milk contracts were made, and they continued to hold their stock until late in August, 1892, that no stock book showing transfers was kept, that the only record kept of the issuing of stock was the entry on the stubs left after removing the stock certificates, and that while the stubs of the new certificates issued to the purchasers of this stock showed from whom the stock was received, the stubs of the certificates issued to the defendants in error did not show that said stock had been sold or transferred.

"As there was no regular stock book showing transfers kept by the company, the stock certificate book and stubs were made to take its place, and upon these stubs and upon the stock subscription book the names of these defendants in error stood as stockholders; and it is well settled that all whose names so stand upon the stock book are liable as stockholders to those dealing with the corporation, until the stock book shows that such stock has been transferred, or disposed of in some other way.

"It is urged in behalf of defendants in error that as the stubs of the stock issued to the purchasers thereof showed that the stock was received from the defendants in error, such stubs were notice to the world that such defendants were no longer stockholders, even though the stubs of the original issue of the stock to them still showed defendants in error to be stockholders, and nothing appeared on those stubs to show a transfer of their stock. This claim is not sound.

"By Rev. Stat. 3254, it is provided that a book shall be kept by the corporation for the purpose of registering therein all subscriptions and transfers of stock, and it is made the duty of

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the directors to keep such record, and of the secretary to register in such book all subscriptions and transfers of stock; and it is further provided that whenever any certificates of stock are assigned and delivered by a stockholder, the assignee thereof shall be entitled to have the stock transferred to him upon the books and to have his name enrolled as a stockholder.

"It is not the assignment and delivery of the certificate of stock that relieves the stockholder from liability for the debts of the corporation, under this section, but the transfer of the stock on the books; because after such transfer the old stockholder no longer stands as a stockholder on the books of the company. The stock book is notice to the world as to who are stockholders of the corporation, and the statute has provided how the book and transfers shall be kept, and this provision is for the protection of the public, and to inform stockholders as to their liability, and how and when an end may be put to such liability.

"If this corporation had kept a stock book showing transfers, and these defendants in error had caused their stock to be transferred on such book, they could not be held liable for debts thereafter incurred. Instead of obeying the statute in this regard, they resorted to the practice of keeping the stock account and transfers on the stubs, supposing that to be as good as a regular stock book. In this they were mistaken. A stock book would have shown the subscription and transfer in the same account, but the stubs of the old certificates showed only that the stock had been issued, and failed to show that it had been transferred. True, the stub of the new certificate showed from whom the stock came, but the stub of the old certificate failed to show where the stock had gone, or that it had been transferred at all. The whole stub book taken together might have shown the transfer of this stock, but the public cannot be put off with less than the statute gives them.

"The statute having prescribed the manner of keeping the record of the subscription and transfer of stock, a different method will not be upheld, unless it is shown to be equally as good and convenient as the one provided by statute. Stockholders cannot escape liability by pursuing a course different from that provided by statute, and which imposes additional

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burdens upon the public, or makes it more difficult to ascertain who the stockholders are. The public has a right to rely upon the statute, and is entitled to its provisions, or its full equivalent.

"It follows that the circuit court erred in not rendering judgment against the defendants in error for an amount equal to the amount of their stock. The judgment of the circuit court will be modified by rendering judgment against the defendants in error for the remainder of their liability."

Said Rev. Stat. 3254, by itself, or as construed by the court in the Herrick case, cannot, in my opinion, be held to mean that the legislature has made or meant to make a person liable as a stockholder in a corporation when in fact he is not and was not such stockholder. Such a construction would make the statute repugnant to both the federal and the state constitutions. But the legislature, as has often been decided, can make a rule of evidence, and I think that is what the court intended to decide in the Herrick case; that is, by the rule of evidence established by the section of the statute quoted, Wardwell and others were held to be stockholders.

On April 29, 1902, said Rev. Stat. 3258 was amended so as to read as follows:

"The stockholders of a corporation who are the holders of its shares at a time when its debts and liabilities are enforceable against them, shall be deemed and held liable equally and ratably, and not one for another, in addition to their stock, in an amount equal to the stock by them so held, to the creditors of the corporation, to secure the payment of such debts and liabilities; and no such stockholder who shall transfer stock in good faith, and such transfer is made on the books of the company, or on the back of the certificate, properly witnessed, or tendered for transfer on the books of the company, prior to the time when such debts and liabilities are so enforceable, shall be held to pay any portion thereof. (52 O. L. 44, Sec. 78, S. & C. 310, R. S. of 1880, 95 O. L. 312)."

The Herrick case was decided on April 19, 1898. The said section of the statute was amended as above on April 29, 1902,

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evidently because of the decision in the Herrick case and to escape from its consequences. In my opinion it established a new rule of evidence as to ownership of stock, and in that view it is constitutional. By it, stock may be transferred, if done in good faith, by delivering the certificate, with the transfer on the back thereof properly witnessed and signed; and when thus transferred, such transfer is evidence that the person so transferring it is no longer a stockholder.

The testimony of George A. Stanley and H. E. Williams is, that "on August 29, 1901, said George A. Stanley, in good faith, released and surrendered said thirty shares of stock to the company, by a writing on the back of the certificate representing said stock, properly signed and witnessed." True, the statute was not amended as above quoted until April, 1902. It is also true that none of the debts, for the payment of which it is now attempted to hold said George A. Stanley, were incurred or created until after both said dates. The certificates so signed and witnessed were delivered to the company on August 29, 1901, and were in the possession of the company from that time until the books and papers of the company came into the hands of the receiver. This is made reasonably certain from the agreed statement of facts, which contains this statement: "That at the time the books and papers of said company came into the hands of the receiver, and among said papers was an envelope on the outside of which was written 'Treasury stock of the Mattie Mitchell Company formerly issued to George A. Stanley and Jessie McMath Stanley,' and which envelope contained the two certificates referred to above, and has ever since been in the hands of the receiver." So, such evidence of ownership was created on August 29, 1901, and remained in existence and in possession of the company until long after this action was commenced, and was so in existence and in such possession when said statute was amended as aforesaid, and when the said debts were incurred and created, and was available to any person from whom the company was seeking credit; and any prospective creditor, if he had searched for evidence on that subject, in the papers, books and documents of the company, would have found it. There is absolutely no evidence or claim in the case that

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any creditor made any investigation before giving credit to the company, as to who were the stockholders in fact, or in the view of the law as stated in the Herrick case, or that any creditor claimed that said George A. Stanley was, or that he, the creditor, thought he, Stanley, was in fact a stockholder; or that such creditor had made any examination at all concerning what the books or stubs of the company showed on the subject.

It follows that, so far as this feature of the case is concerned, I find against the contention of the plaintiff.

The defendant claims a corporation, in purchasing its own stock, is not acting *ultra vires* of the corporation, and cites three cases in support thereof. The first case cited is that of *Taylor v. Miami Exporting Co.* 6 Ohio 177, and others, decided by the Supreme Court in 1833. The court in that case sanctioned the acquiring by the corporation of shares of its own stock when done in good faith, but it seems to me the court based its opinion on the wording of the charter of the company. That company was created while the constitution of 1802 governed, and which constitution did not expressly provide for or prohibit the formation of corporations. The practice under it was for the legislature to create corporations by special act, which act was the charter of the company.

I conclude the court decided as it did in the Taylor case because the charter authorized it. This conclusion, I think, is borne out by the following quoted language from the opinion on page 219, to wit:

“As to the authority of the directors to receive the stock of the company in payment of the debts of the stockholders. This company was incorporated on April 15, 1803, its charter to continue until May 1, 1843. The ostensible object of those who obtained the charter, was to purchase the agricultural and manufactured products of the country, and to transport them to foreign markets; hence the name, ‘Miami Exporting Company.’ Section 6 of the charter authorizes the appointment of agents and the making of shipments. By section 8, the company is required to vest in produce and manufactures at least one-half of the cash received on shipments. Their real object was banking; and the directors were, by the charter, designedly given most ex-

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tensive powers over the funds of the company, so as to authorize them to employ the whole in business other than that apparently intended as the sole object of the incorporation. By section 5 of the charter, it is provided that the president and directors shall open and continue their office in the town of Cincinnati, 'and shall have the sole management of the funds.' By section 6, the president and directors are authorized 'to dispose of the funds of the company in such manner as they shall think most advantageous to the company.' The directors are here undoubtedly authorized to cease merchandising, and to dispose of the funds of the company in banking, in discounting notes and bills of exchange, if they think it 'most advantageous.' They are as undoubtedly authorized to dispose of their funds, and to employ their agents in buying and selling the stocks of other corporations, if they think this 'most advantageous.' It appears from the testimony in the case, that they were at one time largely and profitably employed in buying and selling the stock of the Bank of the United States. If they could so vest their funds, why have they not power to buy and sell their own stock, if they 'think it most advantageous to the company'? We think they have such power;" etc.

If my understanding of that case is the correct one, it cannot be taken as an authority in favor of defendant's contention.

In 1856 the United States Circuit Court for the northern district of New York decided the case of the *State Bank v. Fox*, 3 Blatchf. (N. Y.) 431. In the opinion the court, on page 433, says:

"3. It is insisted that the facts set up and proved by the defendants constitute a defense to the note. It appears by the bill of exceptions that the Columbus Insurance Company, to whom the note was given, had taken a considerable portion of their stock in payment of debts due to it. This they had a clear right to do. *Taylor v. Exporting Co.* 6 Ohio 176, 218."

This case does not decide that corporations can buy their own stock. It decides nothing further than that a corporation can take its own stock in payment of debts due to it. In other words, it recognizes that, under at least one set of circumstances, a corporation can acquire its own stock.

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In 1858 the court of appeals of the state of New York decided the case of *City Bank v. Bruce*, 17 N. Y. 507. The question decided was precisely the same as in *State Bank v. Fox*, *supra*, and the case was practically between the same parties and upon similar facts. The first paragraph of the syllabus reads:

"In the absence of prohibition by statute, a corporation may purchase its own stock, hold it unextinguished, and reissue the same."

The court, in the opinion on page 511, says:

"* * * In that year, the company then being in full operation, with a capital of \$300,000, the amount authorized by its charter, the board of directors of the company resolved that any stockholder indebted to the company on stock notes might have the privilege of paying any part or all of such indebtedness in the capital stock of the company, at a rate specified in the resolution. Under this authority, stock was surrendered or transferred to the company in payment of notes to the amount of \$133,000. There seems to be no ground for questioning the validity of this transaction. I am not aware of any common law principle that forbids it, nor is it shown to have been in contravention of any provision of the company, or any other of the statutes of Ohio. In the case of *Taylor v. Exporting Co. supra*, it was held that a bank might receive its own stock in payment of a debt," etc.

The same may be said of this case as was said of *State Bank v. Fox, supra*, with the addition that, as I view *Taylor v. Exporting Co. supra*, as hereinbefore indicated, the two cases citing it extended it further than the opinion of the court rendering it warrants. In my judgment, this case did not decide that a corporation can buy its own stock, but the most that can be claimed for that is, that under some circumstances a corporation may acquire shares of its own stock.

Before taking up the cases that bear on the other side of the question, it is well to have in mind that there is no statute in Ohio that forbids a corporation from acquiring shares of its own stock, and that such an act cannot be said to be immoral in the sense that it would be *malum in se* or *malum prohibitum*.

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The earliest case in which I find the question discussed is *State v. Bank*, 10 Ohio 91, decided in 1840. In the course of the opinion the court says, on page 98:

“Money paid in upon a bank share, or in other words, upon a share of bank stock, becomes corporate property, and may be disposed of in payment of the debts of the corporation, or in any other legitimate way. So lands or any other property received in payment of debts become corporate property, and if sold at an enhanced price, there is so much addition to the profits of the business. So bank shares may, by an individual stockholder, be transferred to the bank in payment of a debt, and when so transferred become the property of the corporation, and it is believed that this is the only legitimate way in which a banking corporation can, as a corporation, become interested in its own stock. And even the propriety of this mode of acquiring property in stock has been seriously questioned.”

This case decides, as did the three cases last above herein referred to, that under at least one set of circumstances a corporation can acquire its own stock.

It will be noticed that the court, after deciding the point before it, expresses opinions on two points not necessarily before it in this language: “And it is believed that this is the only legitimate way in which a banking corporation can, as a corporation become interested in its own stock. And even the propriety of this mode of acquiring property in stock has been seriously questioned.” It does not cite any authority, text-book or decision or give any reason for such opinions. They must be treated as gratuitous, and not decisive of any question before the court.

The next decision I find was made in 1878, and was by the district court of Hamilton county, in *Hubbard v. Riley* 3 Bull. 435. The decision is as follows:

“Judge Cox announced the opinion, and after reviewing the testimony said it was the opinion of the court that C. M. Hubbard was a stockholder and was subject to the liabilities of a stockholder. There was an absolute agreement on his part to purchase the shares of stock at \$1000 a share each, and

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an agreement on the part of the company to repurchase the stock from him if he was not satisfied. He gave to Albin, Son & Company, in payment of his stock, \$5000, and his notes for \$5000, endorsed, and on the organization of the company was elected secretary. At the end of the year the company bought back the stock and gave him their notes for \$5000, and these were transferred, after the company became insolvent, to his father, for the purpose of repaying the loan of \$5000 he obtained from him. The law is well settled that an incorporated company, unless the power is given in its charter, cannot purchase or deal in the stock of its corporation."

The judge, in deciding the question, does not cite any authority or give any reason for his statement that "The law is well settled that an incorporated company, unless power is given it in its charter, cannot purchase or deal in the stock of its corporation."

The next case in point of time is *Coppin v. Greenlees*, 38 Ohio St. 275 [43 Am. Rep. 425], decided in 1882, in the Supreme Court. The syllabus of that case is as follows:

"An executory agreement between a manufacturing corporation of this state and one of its stockholders, for the purchase of the stock of such corporation, by the former from the latter, cannot be enforced either by action for specific performance or for damages."

The court in its opinion says:

"Whether the defendant corporation was bound by its executory agreement with the plaintiff to purchase shares of its own stock, under the circumstances detailed in the petition, was, undoubtedly, the question upon which the case turned in the district court.

"The power of a trading corporation to traffic in its own stock, where no authority to do so is conferred upon it by the terms of its charter, has been a subject of much discussion in the courts; and the conclusions reached by different courts have been conflicting. Of course, cases, wherein the power is found to exist by express or implied grant in the charter, furnish no aid in the solution of the question before us; unless

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the claim of the plaintiff can be sustained that such power was conferred on the defendant by Sec. 63 of the corporation act of 1852, as amended, which confers on manufacturing corporations the power enumerated in Sec. 3 of the act, and, among others, the power 'to acquire and convey, at pleasure, all such real and personal estate as may be necessary or convenient to carry into effect the objects of the corporation.' We think, however, that this claim cannot be maintained. The sole object of the defendant organization was 'for manufacturing purposes'; and it cannot be said, in any just sense, that the power to acquire or convey its own stock was either necessary or convenient 'for manufacturing purposes.' "

The doctrine that corporations, when not prohibited by their charters, may buy and sell their own stocks, is supported by a line of authorities; and, prominent among them, may be mentioned the cases of *Dupee v. Water Power Co.* 114 Mass. 37, and *C. P. & S. Ry. v. Marsailles*, 84 Ill. 145. But nevertheless we think the decided weight of authority, both in England and in the United States, is against the existence of the power, unless conferred by express grant or clear implication. The foundation principle, upon which these latter cases rest, is that a corporation possesses no powers except such as are conferred upon it by its charter, either by express grant or necessary implication; and this principle has been frequently declared by the Supreme Court of this state; and by no court more emphatically than by this court. It is true, however, that in most jurisdictions, where the right of a corporation to traffic in its own stock has been denied, an exception to the rule has been admitted to exist, whereby a corporation has been allowed to take its own stock in satisfaction of a debt due to it. This exception is supposed to rest on the necessity which arises in order to avoid loss; and was recognized in this state as early as *Taylor v. Exporting Co.* 6 Ohio 176, and has been incidentally referred to as an existing right since the adoption of our present constitution. *State v. Building Assn.* 35 Ohio St. 258.

"But, however that may be, the right of a corporation

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to traffic in its own stock, *at pleasure*, appears to us to be inconsistent with the principle of the provisions of the present constitution, Art. 13, Sec. 3, which reads as follows: (Hereinbefore quoted.) Now, it is plain that a business or trading corporation cannot exist without stock and stockholders, as it is that the creditors of such corporations are entitled to the security named in the constitution. *State v. Sherman*, 22 Ohio St. 411. A corporation itself cannot be a stockholder of its own stock within the meaning of this provision of the constitution. Nobody will deny this proposition. And if a corporation can buy one share of its stock *at pleasure*, why may it not buy every share? If the right of a corporation to purchase its own stock *at pleasure*, exists and is unlimited, where is the provision intended for the benefit of creditors? This is not the security to which the constitution invites the creditors of corporations. I am aware, that the amount of stock required to be issued is not fixed by the constitution or by statute, and also that provision is made by statute for the reduction of the capital stock of corporations; but of these matters, creditors are bound to take notice. They have a right, however, to assume that stock once issued, and not called back in the manner provided by law, remains outstanding in the hands of stockholders, liable to respond to creditors to the extent of the individual liability prescribed. In this view it matters not whether the stock purchased by the corporation that issued it, becomes extinct, or is held subject to be reissued. It is enough to know that the corporation, as purchaser of its own stock, does not afford to creditors the security intended. And surely, if the law forbids the organization of a corporation without stock, because the required security is not furnished, it cannot be, that having brought the corporation into existence, it invests it with power to assume, *at pleasure*, the identical character or relation to the public, that was an insurmountable objection to the giving of corporate existence in the first place.

“If it were averred that the plaintiff had purchased this stock from the defendant company, or from others, under an

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agreement with the company that it buy the same from him when he quit its employment, or if the contract of purchase by the defendant had been executed, very different questions would arise."

This clearly decides that a corporation cannot buy or traffic in its own stock *at pleasure*. In the Coppin case plaintiff endeavored to enforce an executory contract. If the contract had been executed, the court in that case says, "very different questions would arise."

The next case in point of time is *Shaw v. Installation Co.* 10 Dec. Re. 233 (19 Bull. 292). The court, in its opinion in that case, says:

"The principal contention of defendants is, that the agreement to surrender the stock and accept in lieu thereof a right to one-fifth of the earnings of the company, was illegal and void, because a corporation cannot traffic in its own stock, and because the plaintiff was himself a director of the company when the agreement was made.

"The former objection appears to be well taken. It is a settled law in Ohio that a corporation cannot buy its own stock, or become a holder thereof for any purpose except as security for a pre-existing liability. *Coppin v. Greenlees*, 38 Ohio St. 275; *Taylor v. Exporting Co.* 6 Ohio 176; *Hubbard v. Riley*, 7 Dec. Re. 473 (3 Bull. 434)."

This, it will be observed, was also an effort to enforce an executory contract.

The next case in point of time is the *Merchants Nat. Bank v. Carriage Co.* 9 Circ. Dec. 738 (17 R. 253). The syllabus of that case reads as follows:

"1. A resolution by a corporation authorizing the purchase of a part of its own stock by B, as trustee for the company, to be paid for with notes of the company, is a purchase of the stock for the company.

"2. Such a purchase by a corporation from two of its officers 'in consideration of their proposed retirement,' does not come within the exception to the general principle of law that a company cannot deal in its own stock; the purchase

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was invalid, and those who attempted to sell did not cease to be stockholders."

The court in its opinion says, on page 255:

"That a company cannot deal in its own stock is a well settled principle of the law that needs no citation of authorities. There are exceptions to this rule in cases only where the company may buy in its stock for the purpose of saving it from loss, and for its own protection."

From the foregoing it may be said that, as a general principle of law in Ohio, a corporation cannot deal in or buy its own stock *at pleasure*; that if the contract concerning such a sale is executory, it cannot be enforced by either party to it; if executed on both sides, the Supreme Court, in the Coppin case, *supra*, leaves the question somewhat in doubt. Note the language of the court in its opinion: "If the contract had been executed, very different questions would arise." I can imagine some of these questions would be,

(a) The rights of the parties, as between themselves, if no rights of creditors or others had intervened;

(b) The rights and liabilities of such selling stockholder in relation to rights of intervening creditors.

The cases above referred to also seem to decide that the principle, that a corporation cannot buy its own stock, is not an iron clad one, but is modified to the extent, at least, that a corporation can buy its stock to pay debt due it from a stockholder. This exception, of course, must be on the principle that a corporation can acquire its own stock when done to avoid loss.

Let us now consider whether a corporation can acquire its stock under circumstances other than that for the payment of a debt due to it.

In 1879 the Supreme Court decided the case of *State v. Building & L. Assn.* 35 Ohio St. 258. That case recognizes the power in a corporation to receive and cancel shares of its stock in compromise of an indebtedness to the corporation, or other similar purpose. In its opinion the court says, on page 263:

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"We do not deny a corporation has power to receive shares of its stock as security for a debt or other similar purpose."

And also on page 263:

"The association compromised with several of its members, and released them from further obligation to the corporation, as well on account of indebtedness for loans, as on subscriptions. We have examined the evidence, and we do not find there was any want of good faith in these transactions. The interest of the stockholders, as well as the public, seems to have been kept in view. Of course, without this such acts could not be upheld; but we are not able to find in the statute any inhibition of the power to make such compromises, and, on the fullest consideration, we unite in holding that the power exists."

The next case I find in point of time was decided by the Supreme Court in 1888, the case being *Morgan v. Lewis*, 46 Ohio St. 1. The second paragraph of the syllabus reads as follows:

"Upon the trial of the action, one of the defendants, an alleged stockholder, offered to prove that he originally became a stockholder by receiving from the corporation its stock in exchange for his interest in a furnace of which he was principal owner; that thereafter, the furnace not proving as successful and profitable as had been expected, some of the stockholders were dissatisfied with the purchase, and contentions arose among them; that defendant was blamed by many of them for having induced the company to make the purchase, and was requested to take the furnace back, and transfer to the company the stock he had received for it; that to settle such contention and dissatisfaction, he complied with this request, and transferred his stock to the company, and accepted therefor a deed for the furnace. Held: The evidence was admissible.

I will quote freely from the opinion of the court, beginning on page 5, as it discusses the question at more length

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than any previous cases, and construes several of the former decisions, as well as the principle that should govern.

"The theory upon which the referee and the court of common pleas must have proceeded was, that the entire transaction by which Morgan acquired the furnace, and the company acquired his stock, was void; that it was beyond the power of the company to engage in the transaction, and that consequently the company acquired no title to the stock, and Morgan acquired none to the furnace property. If this conclusion is sound, the inevitable consequence is, that the company still owns the furnace, and it is assets in the hands of the assignee for the payment of the company's debts. It is an absurdity to assume that Morgan is still the owner of both the furnace and the stock. If he is still liable to creditors as a holder of this stock, the company, by the same reasoning, is owner of the furnace. It is conceded that the proceeding to subject the liability of stockholders to the satisfaction of the claims of creditors, has throughout ignored this property. It does not appear but that this property alone would satisfy creditors, nor to what extent it would exonerate stockholders from the liability which it is now sought to subject to the satisfaction of creditors' claims. If we were in accord with the referee and the court of common pleas upon the main proposition of the case, still it would be our duty to send the case back for proceedings to subject this property of the company to the satisfaction, *pro tanto*, of its debts."

I desire to call attention to the following paragraphs from the opinion in said case:

"We are of opinion, however, that the referee erred in excluding the evidence which Morgan offered, to throw light upon the transaction by which he assumed to acquire the furnace, and transfer his stock to the company.

"The contention of Morgan, in this respect, is not answered by the proposition that the only purpose of offering the rejected proof was to show that the transaction was in good faith, and that this already sufficiently appeared. We have no disposition to call in question the general and well-recognized

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principle that a corporation cannot buy its own stock. It is conceded that this principle proceeds upon *a want of power*, rather than upon any express prohibition in its charter. With this general principle conceded, however, the right of a corporation to take its own stock in satisfaction of a debt due to it, has long been recognized in this state.

"This has been recognized as an exception supposed to rest upon the necessity of avoiding loss. *Coppin v. Greenlees*, 38 Ohio St. 279. It is, nevertheless, a relaxation of the general rule. It is, of course, because of the necessity of avoiding loss, and not because it is for the satisfaction of a debt, that the exception is recognized. If the same or a like necessity of avoiding loss should arise in any of the transactions of the company, it could not, with any show of reason, be contended that the application of this principle of necessity should be limited by any iron rule to the case of taking stock for an otherwise hopeless debt."

"The evidence which Morgan offered, and the referee rejected, tended to establish, in substance, that Morgan had traded to the company this furnace property for stock. That the furnace promised to prove a failure, or, at best, a disappointing and unsatisfactory venture. Contentions arose over the transaction, between Morgan and some of the stockholders. Many of them blamed him for having induced the company to make the purchase. Thereupon they—'many of the stockholders'—simply proposed a rescission of the contract of purchase; that Morgan take back the furnace and restore to the company the stock he had received for it. The company was out of debt. Nobody could possibly be hurt by a rescission of this contract, which had caused so much discontent and contention, and which promised to be a losing venture for the company, and Morgan's fellow stockholders. This proof would have established something beyond the mere good faith of the transaction. It would have tended to establish the fact that Morgan yielded to the importunities of many stockholders to rescind a bargain, and set at rest an unfortunate controversy which was rapidly breeding discord among the stockholders."

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“The finding of the referee, that this transaction itself worked a reduction of the capital stock of the company, is not tenable. There was nothing in the way of the company reissuing this stock, or its equivalent, to others who may have desired it. There was nothing in the fact that these certificates were marked ‘cancelled’ on the face, by the secretary of the company, and by him treated as surrendered stock, to authorize the finding that the capital stock of the company was reduced. This was no part of the transaction with Morgan, and there was nothing in the fact of the re-exchange of stock for the furnace which called upon the officers of the company to treat the stock as cancelled or the capital *pro tanto* reduced. This conclusion is not, in principle, qualified by the fact that the stock was not in fact thereafter represented. Then, we should not lose sight of the fact that there was an executed transaction. The exchange—or the re-exchange, rather—had been made, possession of the furnace taken by Morgan, and retained by him for years before the transaction was questioned by any one. To this day it has remained free from direct attack. Certainly, the possession by Morgan of this property, which had theretofore been in the possession of the company, was a circumstance proper to be considered with other facts in the case. It at least helps us to distinguish it from the case of *Coppin v. Greenlees*, 38 Ohio St. 275, relief upon by the defendants in error. In that case it was held that:

“ ‘An executory agreement between a manufacturing corporation of this state and one of its stockholders, for the purchase of the stock of such corporation by the former from the latter, cannot be enforced, either by action for specific performance or for damages.’

“That this presents a very different case from the one of an executed contract is emphasized by the following language of Judge McIlvaine, by whom the opinion was prepared:

“ ‘If it were averred that the plaintiff had purchased this stock from the defendant, or from others, under an agreement with the company that it buy the same from him when he quit

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its employment, or if the contract of purchase by the defendant had been executed, very different questions would arise.'

"In *State v. Building Assn.* 35 Ohio St. 263, the general principle that a corporation may not traffic in its own stock is recognized. Yet in the same connection it is said: 'We do not deny that a corporation has power to receive shares of its stock as security for a debt or other similar purposes.'

"It is apparent from the foregoing that no inflexible rule has been recognized by this court, that a corporation may not in any case, nor for any purpose, receive its own stock. On the contrary, the way is left open for the application of exceptions to the general rule in proper cases. It is one of the established facts in the case that all the debts which are sought to be satisfied by this proceeding were contracted subsequently to the transaction which is assailed. The transfer of the furnace property from the possession of the company to that of Morgan was a fact to which persons giving credit to the company could not safely close their eyes. The inquiry which it would naturally excite would have led to the information that the trade by which the company secured the furnace, and Morgan the stock, had simply been rescinded, and the property—stock and furnace—re-exchanged.

"It being the law of our state that there are exceptions to the general rule, that corporations may not deal in their own stock, all persons dealing with this company must be held to have done so in the light of this phase of the law. All persons are as much presumed to know of exceptions to a principle as of the principle itself. The slightest inquiry would have revealed the fact, that as between himself and the company, Morgan did not sustain the relation of stockholder at the time these debts were contracted."

The agreed statement of facts shows that prior to April 10, 1901, the defendant company was engaged in the manufacture and sale of the "Mattie Mitchell Self-Rising Flour," a new and untried variety of food product for which there was little or no market or demand; that on April 5, 1901, the company increased its capital stock from \$30,000 to \$50,000, and,

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by its board of directors, empowered, authorized and directed its president and secretary to issue and sell 200 shares of the increased capital stock, for the purpose of "advertising and creating a demand for said food product"; that the president and secretary, acting under the authority, power and direction of the company, on April 11, 1901, sold to said George A. Stanley 30 of said shares, and issued a certificate therefor to him; and for the purpose of inducing said Stanley to purchase said stock, the president and secretary represented to said Stanley that said company could and would obtain the entire amount of money required for the above purpose from the sale of its unissued stock; and further said president and secretary represented that inasmuch as said business was largely experimental in character, said company would conduct its business entirely within its paid-in capital, and that it would not enlarge or increase its expenditure beyond its said capital, and that in no event would said company obtain credit or borrow money for the purpose of carrying on its business, or for advertising or creating a demand for its said product; and that said Stanley, in purchasing said stock, relied upon said representations and promises, and would not have purchased the same had said representations and promises not been made to him.

This proof means that the company was incorporated to manufacture and sell a new and untried variety of food product, for which there was little or no demand or market; and that, prior to April 10, 1901, the funds of the company had been largely used in advertising and attempting to create a demand for said food product; and that the board of directors, on April 5, 1901, needing more money for said purposes, increased its capital stock from \$30,000 to \$50,000, and authorized, directed and empowered the president and secretary to sell 200 shares of stock to raise money for advertising and creating a demand for said food product; and that the president and secretary, in carrying out said power, authority and direction, represented and promised to Stanley, as aforesaid. These representations and promises mean that the company had determined that it could and would obtain all the money it needed

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for these purposes from the sale of its unissued capital stock; and that it had been determined, as the policy of the company and business, that it would and could conduct its business within its paid-in capital; and that, with the addition of the money obtained from the sale of said stock, it would have passed the experimental stage, and would not need any more money for the purposes aforesaid; and that in no event would it borrow money for carrying on its business, or for advertising or creating a demand for its said product. In other words, these representations mean, that the company, with the money realized from the sale of said stock, would have passed the experimental stage, and would be in such condition that it would have created a demand for its food product sufficient in volume to warrant its continuing in business; or, if such was not the situation, it would not borrow money to carry on its business, or advertise or further attempt to create a demand; that the company would then be a success, or future failure was so sure that it would be inadvisable to further attempt to carry it on; and that stockholders would not be made liable by any loss other than what had been incurred in the purchase price of the stock; and that these promises and representations were relied upon by said Stanley, and induced him to buy said stock; and had they not been made, he would not have made such purchase.

The agreed statement of facts further shows that afterwards, and before August 29, 1901, said company had expended a large sum of money in advertising, and had exhausted its means for further conducting its business; and then, by its officers and directors, determined to borrow a large sum of money to be further used in advertising such food product, which was in violation of the representations and promises aforesaid. In other words, the company determined it would use money for advertising, and would subject stockholders to a further liability. Said George A. Stanley was unwilling to be thus subjected, and insisted that the representations and promises made to him be observed; and, in furtherance of the protection of what he conceived to be his rights, objected

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and protested to the stockholders and directors of said company, and to the bank from whom it purposed to borrow money. This caused the directors to believe that if Stanley carried out his purpose, a situation would be created whereby the company would be involved in ruinous litigation, and embarrassed in borrowing money, and perhaps prevented from borrowing money, or which might work a dissolution of the company, from any or all of which great loss would follow to the company and its other stockholders.

With this situation confronting the company and its directors and other stockholders, on August 29, 1901, in the language of the agreed statement of facts "thereupon, and for the purpose of avoiding loss to the company and adjusting said controversy whereby it might be able to continue its business, said company, by its officers and directors, then and there agreed to receive back its said shares of stock and return to said defendants George A. Stanley and Jessie McMath Stanley the amounts of money they had paid therefor, without use or diminution thereof, and regardless of the result of the business while said stock had been held by those defendants; and pursuant to said agreement, on August 29, 1901, said George A. Stanley, in good faith, released and surrendered said 30 shares of stock to the company by a writing on the back of the certificate representing said stock, properly signed and witnessed, and delivered the same to the secretary of the company, and requested that said release and surrender be properly entered on the books of the company."

This action was afterwards ratified and approved by all the directors and all the stockholders of the company.

In the case at bar, as in the Morgan case, *supra*, the good faith of all the parties was not questioned.

The thing done was done to avoid loss to the company.

It was an executed transaction.

The company at the time was not in debt.

It has always remained free from direct attack.

It was not questioned by any one for several years after it occurred.

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Again, the company, in acquiring said stock, was not attempting to deal in its own stock *at pleasure*.

I think the facts of this case bring it within the reason, spirit and principle of the opinion of the court in the Morgan case, which opinion, among other things, says:

"It is apparent from the foregoing that no inflexible rule has been recognized by this court, that a corporation may not in any case, nor for any purpose, receive its own stock. On the contrary, the way is left open for the application of exceptions to the general rule in proper cases."

The court is of the opinion that this decision is in harmony with an utterance of our Supreme Court in *Crawford v. Rambo*, 44 Ohio St. 279, 285 [7 N. E. Rep. 429], in these words:

"The principles of an enlightened system of jurisdiction should be made to vary with circumstances, and to be so applied as to meet the difficulties and conditions of a people. It is with this qualification that, as has been frequently observed by the courts, the common law has been adopted in this state."

It follows, and I hold, that George S. Stanley was not a stockholder, and the referee erred in holding him to be such. A decree may be prepared accordingly.

HOMESTEAD EXEMPTION.

[Hamilton Common Pleas, April 24, 1911.]

IN RE, W. C. DAVIES.

1. Husband and Wife "Living Together" though Living Apart Pending Insolvency.

A husband and wife are "living together" within the meaning of Gen. Code 11738, providing for homestead exemption, notwithstanding the facts that the husband, following an assignment for creditors, became unable to support his wife and even that his present domicile is unknown to her, if she expects that he will return to her as soon as he is able to provide for her support.

2. Residence in State at Time of Disappearance of Assignor Justifies Assumption of Continued Residence in State.

Since, upon an application by assignor for allowance in lieu of a homestead in property assigned for creditors, it appears that assignor and his wife are living apart and that the domicile of

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assignor is unknown to the wife who is a resident of this state, he will not be assumed to be nonresident thereof if he was a resident of the state when last heard from.

3. Possession by Wife of Home Encumbered by Liens not Bar to Homestead Exemption.

The fact that at the time of an assignment the assignor and his wife were living in a house which belonged to her and was heavily encumbered with liens, and from which they removed and she has since collected rent therefor, is not a bar to an allowance in lieu of homestead after the assignment, if the property was at the time of the assignment and is still so encumbered with liens as to preclude the allowance of a homestead therein.

APPLICATION for exemption.

Ben L. Heidingsfeld, for W. C. Davies.

William R. Collins, for assignee.

Herron, Gatch & James, for judgment creditors.

SWING, J.

W. C. Davies having made an assignment for benefit of creditors, made application in the court of insolvency for an allowance of \$500 in lieu of a homestead, under Gen. Code 11738. The facts shown by the testimony are as follows:

At the date of the assignment, W. C. Davies, the assignor, was living in the family residence in Pleasant Ridge, Hamilton county, Ohio, the residence being the property of his wife. Davies continued to live in this house and to occupy it as a homestead until after the sale of the assigned assets by his assignee. Subsequently, but without abandoning the homestead in Pleasant Ridge, having the intention to return, Davies and his wife resided for a time temporarily in Covington, Kentucky, and were living there at the time of the trial in the court of insolvency. Afterwards Mrs. Davies removed to Montpelier, Ohio, where she is now residing, but she still has the intention of returning to Pleasant Ridge and occupying her house there if she can. The house is heavily mortgaged, the mortgage liens and taxes in arrears at the time of the assignment being nearly if not quite the value of the property. Mrs. Davies is now receiving rent for it, it being occupied by a tenant or lessee. Mr. and Mrs. Davies are not now actually living together, but are not

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separated by any agreement. Mrs. Davies does not know where Mr. Davies is at this time. When she last heard from him he was in Cleveland, Ohio, staying with his mother. All the family furniture has been moved out of the house. Mrs. Davies testified that she expects Mr. Davies to return to her when their financial condition will permit. The testimony showing the facts as here stated is not controverted. The evidence tends to show, I think, that the separation such as it is, is caused by his temporary inability to earn money for the support of himself and his family. There are three questions raised in the case:

First. Whether Mr. and Mrs. Davies are husband and wife living together within the meaning of the statute. The provision of the statute is: "Husband and wife living together, residents of this state * * * and not the owner of a homestead, in lieu thereof may hold exempt," etc.

I am of opinion that under the circumstances Mr. and Mrs. Davies should be held to be husband and wife living together, his absence from her being temporary.

Second. Whether Mr. and Mrs. Davies are residents of the state of Ohio. It is claimed by counsel for the judgment creditors and by the assignee, resisting the allowance, that the burden of proof is upon the assignor to establish his residence in the state of Ohio. I think that the weight of the evidence is that he is a resident of this state. The separation of husband and wife being only temporary, the wife being still in this state and the husband having been when last heard from residing in this state, I do not feel able to assume that he is not now a resident.

Third. Whether, it being shown that the husband and wife were at the date of the assignment, occupying the home in Pleasant Ridge, having left it after the assignment, the application since made can be granted.

The general rule as to the right to demand an allowance in lieu of a homestead is stated by our Supreme Court in *Niehaus v. Faul*, 43 Ohio St. 63 [1 N. E. Rep. 438], as follows:

"The right to demand an allowance in lieu of a homestead under Rev. Stat., section 5441, * * * shall be determined by the state of facts at the time the surplus arising from such sale was finally disposed of by the court."

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But it is claimed that the rule is different in the case of an assignment for the benefit of creditors, and that in such case the applicant must be entitled to the allowance at the date of the assignment. It is said in the case of *Kunkle v. Reeser*, 5 Dec. 422, 426 (5 N. P. 401), by Judge Rockel of the probate court of Clarke county:

"At the time of an assignment the assignor may be the owner of the following kinds or classes of property:

"First. Personal property only.

"Second. Real estate not occupied as a homestead.

"Third. Real estate occupied as a homestead but not encumbered by lien so as to preclude the allowance of a homestead therein.

"Fourth. Real estate charged with liens some of which preclude the allowance of the homestead while others do not.

"Fifth. Real estate charged with liens all of which preclude the allowance of a homestead.

"If the property assigned is of the kind mentioned in the first, second and third of the above classes, then the condition of facts existing at the time the assignment is made will control.

"The deed of assignment conveys to the assignee rights at least equal to those acquired by an officer after having made a levy under Sec. 5483. Each having the legal possession of the property, and for very much the same purpose, *i. e.*, to convert it into money and apply it upon the debts of the owner.

"In both cases the law preserves to the debtor the right to claim his homestead exemption, but it must be a right existing at the time of the levy or the assignment. It cannot be created afterwards."

In the case of *Moody v. Whittaker*, 22 Bull. 168 decided by our Supreme Court April 19, 1889, without report, from the statement of facts it appears that Whittaker made an assignment April 1, 1884, for the benefit of creditors and on April 23, 1884, he made application to the probate court for an allowance of \$500 in lieu of a homestead, and the court found, "Whittaker was then the owner of a homestead, and dismissed his petition," which judgment of the probate court was subsequently affirmed by the court of common pleas, that court find-

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ing: "That Whittaker was not entitled to the allowance asked for."

But later, April 4, 1885:

"After the personal property assigned had been sold by the assignee, Whittaker made another application to the probate court for an allowance of \$500 out of the funds in the hands of his assignee, alleging as a reason therefor that since his first application his homestead had been sold and the proceeds exhausted by mortgage liens."

The probate court found April 6, 1885, that:

"Since the order dismissing Whittaker's first application for an allowance in lieu of homestead, his homestead, which he was then occupying, has been sold to satisfy claims which were at the time of making said assignment liens upon said homestead, and that said homestead has been entirely consumed in the payment of said liens; and that the personal estate of the said assignor has all been converted into money by said assignee, which now remains in his hands for distribution under the order of this court; and the court further finds that said John Whittaker is the head of a family, and that neither he nor his wife is the owner of a homestead, and that he is entitled to \$500 in lieu thereof to be paid to him by the said Moody out of the proceeds of the sale of the personal property of the assignor."

And it was so ordered. This finding and judgment were affirmed by the court of common pleas and later in proceedings in error by the circuit court, and finally by the Supreme Court. It is said in the published account of the case in the Law Bulletin:

"The decision of the common pleas and of the circuit court was that an insolvent debtor who owns and occupies a homestead at the time of making an assignment for the benefit of his creditors, and consequently is not entitled to an allowance in lieu of a homestead, by the subsequent loss or termination of his homestead, becomes entitled to such allowance out of any funds still in the hands of his assignee. In the Supreme Court the decision of the circuit court was affirmed."

The brief of counsel for creditors resisting the allowance in

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that case is published, showing that the contention was clearly made there that the allowance should not be made because:

"At the time the rights of creditors in Whittaker's property were fixed by the assignment and he was the owner of a homestead."

It would seem therefore that according to the decision of the court of common pleas and the circuit court and the Supreme Court in the Whittaker case, an allowance may be made in lieu of a homestead in case of an assignment, after the date of the assignment, under some circumstances, even though the assignor was the owner of a homestead and occupying it at the time of the assignment. It would seem to be implied by the decision of Judge Rockel, above quoted, that application may be made for an allowance in lieu of a homestead after the assignment if the property was encumbered by lien so as to preclude the allowance of a homestead therein.

In the Davies case there is testimony to the effect that the real estate of the wife was at the time of the assignment encumbered by a mortgage, I think for \$1,800, and that there were arrears of taxes, and it appears, I think, that the encumbrances were such as to preclude the allowance of a homestead therein, and the same condition remains at this time.

In view therefore of the fact that the real estate of the wife was at the time of the assignment and is still encumbered by liens so as to preclude the allowance of a homestead, and in view of the decisions of the several courts in the Whittaker case, I am inclined to think that the application in this case was properly made after the date of the assignment.

I have been referred to the decision of Judge Warner of the court of insolvency, *Pelnick, In re*, 57 Bull. 20 (9 N. S. 635), in which case it was held:

"An assignor who was not a resident of Ohio on the day her assignment for the benefit of creditors was made, but became a resident thereafter, is not entitled to homestead exemption under the Ohio law."

I do not mean to express disagreement with the court of insolvency as to the decision in that case; I think the facts may distinguish that case from the Davies case. I am of opinion

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that the principles of the law as stated by Judge Rockel in the Kunkle case, and as held by the courts in the Whittaker case, may be fairly said to be applicable to the Davies case.

The allowance will therefore be granted.

ADVERSE POSSESSION—ESTOPPEL—HIGHWAYS.

[Hamilton Common Pleas, December 23, 1911.]

HAMILTON CO. (COMRS.) v. CINCINNATI, H. & D. RY.

- 1. Width of Roadway Record of Which is Destroyed, Established by Oral Testimony of Fence Lines, Reputed Width, Private Plats and Surveys and Statutory Presumption.**

The width of a roadway, the record of which as shown by plats and other evidences of title is destroyed, may be established at sixty feet at a place of obstruction by the oral testimony of persons long familiar with the fences and land lines in the vicinity, its reputed width, aided by ancient private plats and surveys, and particularly by the presumption created by Gen. Code 7515; hence, in the absence of evidence showing its width at less than sixty feet, a court is justified in concluding that the probabilities of width were the same at the time of construction of the obstruction complained of.

- 2. Right to Encroach upon Highway by Obstructions not Acquired by Adverse Possession.**

No lapse of time bars an action by public officials to recover lands forming part of a highway or street, or to compel the removal of obstructions placed thereon, however long they may have been maintained and regardless of their character as to permanency.

- 3. Highways Used as Toll Roads not Subject to Encroachment by Adverse Possession.**

That a highway was a toll road at the time the obstruction complained of was placed therein and was not abandoned by the company then owning it for more than twenty-one years after the placing of the obstructions does not give title by adverse possession by rendering operative the statute of limitations.

- 4. Railroad Obstructing Highway by Bridge Abutment Estopped to Plead its Wrongdoing against Removal of Obstruction.**

A railway without charter authority to use highways or parts thereof in such a manner as to interfere with the public use can not, after having occupied a considerable portion of a highway for a great number of years with the abutments of an overhead bridge, plead its own wrongdoing as a defense against a public demand that, on account of the great increase in traffic along the road and the construction of street railway tracks thereon, these obstructions be removed.

[Syllabus approved by the court.]

Commissioners v. Railway.

Hunt, Bettman & Merrell, for plaintiff.*Waite & Schindel*, for defendant.**GORMAN, J.**

This is an action brought by the county commissioners of Hamilton county, Ohio, against the Cincinnati, Hamilton & Dayton Railway Company, in their official capacity, asking for a mandatory injunction against the defendant, perpetually enjoining it from maintaining certain abutments of solid stone construction and the earth embankments behind said abutments within the limits of the Springfield pike where the same is crossed overhead by the defendant's railway near the southwest corner of the village of Hartwell, which pike is claimed to be a county road and a public highway, and sixty feet in width, but which abutments at the point aforesaid, encroach on either side of the roadway, leaving a space of but about twenty-five feet between the abutments for the traffic; and the plaintiffs further pray that a mandatory order issue to the defendant requiring it to remove said abutments and embankments from within the limits of said roadway.

The defendant by its answer admits that the Springfield pike is one of the public roads of Hamilton county and that its railway crosses the same overhead; and that there are abutments and embankments where its said railroad crosses said highway, and that the character, location and dimensions thereof are as set forth in the petition. But it denies that said Springfield pike is or ever was sixty feet in width as alleged in the petition; and it denies that its said abutments and embankments are within the lines of said highway. It admits that the county commissioners aforesaid have by resolution declared said abutments and embankments a nuisance and ordered the defendant to remove the same, but that it has refused to comply with said order.

For a second defense the defendant sets up that said Springfield pike, at the place where its railroad crosses the same and north and south thereof, was at all times owned by the Hamilton, Springfield & Carthage Turnpike Company, a corporation for profit under the laws of Ohio, until the — day of September, 1897, on which date, by virtue of the authority of an act of the

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legislature passed April 12, 1890, it abandoned all that part of its said turnpike south of Wyoming avenue in Wyoming village, including that part thereof which is crossed by defendant's railroad at the southwest corner of the village of Hartwell, and that since said abandonment of said turnpike the same has been an abandoned turnpike road and that the public's rights therein are limited to the rights formerly held and possessed by said turnpike company at the date of the abandonment, and that at that time the said turnpike company had no right or title to that land upon which rests said abutments and embankments because said abutments and embankments had been placed there and had been maintained in the selfsame places by the defendant openly, notoriously, continuously and adversely, in the possession of the defendant for more than twenty-one years prior to said — day of September, 1897, and that defendant has at all times since said — day of September, 1897, the date of said abandonment, had the legal right to maintain said abutments and embankments in the same position where they now are and were at the time of the filing of the petition.

By reply the plaintiff denies that said Springfield turnpike was at all times prior to September —, 1897, owned by said turnpike company; but avers that the part of said turnpike referred to in the petition and within the lines of which said abutments and embankments stand, was formerly a state road, and that said turnpike company, a corporation, was granted a franchise therein and right-of-way to use the same as a toll road, by act of the general assembly in or about the year 1840; and that thereafter until the abandonment thereof, about the year 1898, said turnpike company continued to use the same as a toll road. The plaintiff further denies that the defendant has any right or title to the land upon which its said abutments and embankments stand, by adverse possession for more than twenty-one years.

The cause was heard by the court, both parties producing their evidence to maintain their respective claims. From the evidence adduced and the admitted facts, the issues of fact as to the character of this highway, its width, when it was opened for public travel, how it was used and to what width, its width

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between the fences, its reputed width and the time when the railroad's abutments were constructed and its embankments placed behind the same, have been determined.

The evidence to establish these facts consisted of plats and records from the offices of the county recorder, the county auditor and the county surveyor; the oral testimony of individuals who testified as to the width of the pike between the fences, and the traveled portion thereof, as far back as sixty-two years; and the oral testimony of witnesses who have been well acquainted with this highway for a period of from thirty to sixty-two years, that its reputed width has been sixty feet; also private plats of individuals more than fifty years old showing the width of this road, surveys made by surveyors and engineers showing the width of the road to be sixty feet or more. The record of this road as shown by plats, surveys, deeds or other evidence of title, if it ever existed, was destroyed in the courthouse fires, there having been two of such fires since this road was opened for public travel prior to 1840.

Without undertaking to review and analyze the evidence admitted, much of which was admitted over the objection of counsel for the defendant, the court is satisfied that the evidence does establish the fact that this turnpike is and has been for the past sixty-two years at least, and probably always has been—at least sixty feet wide between the lines of its right-of-way, although the traveled macadamized portion thereof has not been more than twenty-five feet. Its reputed width has been established by oral evidence to be sixty feet. The blue print of defendant which was given to the auditor of the county and may be treated as an admission against interest, shows the width of this roadway immediately adjoining the railroad company's right-of-way on the north and on the south to be sixty feet. The property lines adjoining and abutting on this highway north and south of the railroad have been shown by engineers to be thirty feet or more from the center of the roadway on either side, and the center line of the turnpike is the section line between Secs. 1 and 7, Springfield township.

It is admitted that at the time this action was commenced this turnpike was a public road, and when there is added to the

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weight of the evidence tending to establish its width as of sixty feet, the presumption of the law, created by Gen. Code 7515, R. S. 4935c, which lays down a rule of evidence applicable to lost road records, the court believes that the conclusion arrived at that this road is sixty feet in width has been materially strengthened. That section in substance provides that all country roads whose records have been lost or destroyed and not reproduced as provided in the preceding sections of the statutes shall be *prima facie* sixty feet in width. An additional circumstance in favor of the belief that the road is and was sixty feet wide is the fact that the turnpike company's charter authorized it to preempt and take a roadway sixty feet wide (see 32 O. L. L. 157; 36 O. L. L. 222, and 37 O. L. L. 241). Furthermore, Gen. Code 9235 (R. S. 3477) provides that turnpikes and plank roads shall be opened not more than sixty feet wide and at least sixteen feet thereof shall be improved with stone, gravel, wood or other convenient material. In view of these matters and the absence of any evidence tending to show the width of this roadway to be less than sixty feet; and in view of the fact that it is now and has been for many years sixty feet wide immediately to the north and south of the defendant's railroad, the court feels amply justified in concluding that the probabilities are that this roadway was sixty feet wide in 1850, when the defendant built its abutments and filled in its embankments partly within the lines of this highway, encroaching thereon about seventeen and one-half feet on each side of the roadway, and thereby excluding the public from the use of more than one-half of this roadway at the point where these abutments were erected.

It appears as a fact that the defendant company constructed these abutments substantially as they now stand in the exact places where they now stand and that the embankments behind these abutments on both sides of the roadway have been used, owned and in the continuous, open, notorious and uninterrupted possession of the defendant under a claim of right from 1850 down to the present time.

Now the issue of fact, and I may say the only issue of fact in this case, is the width of this roadway—not the traveled width but the width owned, taken or which the public has and had the

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right to occupy and use. If then it be established as a fact or admitted for the purpose of argument that at the time the defendant company placed its abutments and embankments within the lines of this highway the width thereof was sixty feet and that defendant has maintained them therein for more than twenty-one years (which fact is undisputed), has the defendant company acquired thereby a good title by adverse possession? Or, to put it in another way, is the county through its commissioners barred from recovering possession of the parts of the roadway occupied by these abutments and embankments because of Gen. Code 11219, 11220 (R. S. 4977-4978), which limits the time for the commencement of actions to recover the title or possession of real property to twenty-one years after the cause of action accrued?

It is contended by the plaintiffs that the statute just cited does not run against the state or any subdivision of the state as to the public roads or highways which are held not in a proprietary capacity, but in a governmental capacity. On the other hand it is claimed by the defendant that even though it did place its abutments and embankments within the limits of this highway, this was done in 1850 or 1851 openly and notoriously, and at that time this highway or turnpike was a toll turnpike owned and operated by a private corporation—the Hamilton, Springfield & Carthage Turnpike Company—for profit, and that these abutments and embankments continued in the same place so long as this company owned and operated this toll turnpike down to 1897, or for a period of forty-six or forty-seven years; and that the statute of limitations does run against this private company to the same extent and as fully as it runs against a natural person or a private corporation having no public franchise; and that the defendant's title by adverse possession was good as against the plaintiff's long before this turnpike was abandoned in 1897 or 1898, and that upon the abandonment thereof the county and the public acquired only such title to the roadway as the turnpike company had at the date of abandonment.

Now it is generally if not universally held, that the statute of limitations does not run against the sovereign—the state—nor can any one acquire title to the sovereign's property by adverse

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possession. This appears to be the rule in Ohio. *Seeley v. Thomas*, 31 Ohio St. 301, 308; *Green Tp. (Tr.) v. Campbell*, 16 Ohio St. 11.

And it has been established by numerous decisions in this state that the statute of limitations does run against the divisions of the state, such as counties, townships, school districts and municipalities, in all matters touching their proprietary or private interests and possessions, as distinguished from their governmental interests or public interests or possessions; and as to such interests or possessions there appears to be a conflict of authorities.

The matter under consideration is a public road or highway and the county's interest therein and that of the plaintiffs, as commissioners thereof, is governmental or public as distinguished from its private or proprietary interests. It will therefore be unnecessary to consider or cite cases and authorities which apply to the private or proprietary capacity of the subdivision of the state; but only such authorities need be considered as relate to the public or governmental capacity of the municipality, township, school district, or county as are affected by the statute of limitations. And on this phase of the law applicable to the case at bar it is scarcely necessary to go outside of Ohio to determine the rule to be applied to the running of the statute against the public.

Perhaps the earliest decision in which the Supreme Court considered the application of the rule "*nullum tempus occurrit regi*" is that of *Cincinnati v. First Presbyterian Church*, 8 Ohio 298, 310 (32 Am. Dec. 718), in which the court held that the statute of limitations ran against the city of Cincinnati, a municipal corporation, as to certain town lots dedicated to it by the founders of the city and given for public use. A church was erected on these lots and after a lapse of twenty-one years the church claimed title to the lots by adverse possession, or that the statute of limitations barred the city from recovering the lots.

It seems to the court that these lots were not held by the municipality in its governmental capacity as the streets might be held, and that the ruling in this case may be considered as applicable to property held by the city in its private or pro-

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prietary capacity. No authorities are cited by the court to sustain its ruling in the case.

The next case is that of *Cincinnati v. Evans*, 5 Ohio St. 594, where it was held that the statute of limitations applied to an encroachment on one of the city's public streets (Main street), and that municipal corporations are subject to the operation of the statute of limitations in the same manner and to the same extent as natural persons. This doctrine the court said on pages 602 and 603, it adopted from the case of *Cincinnati v. First Presbyterian Church*, *supra*.

But this doctrine can scarcely be claimed to be the settled rule of law now applicable to municipalities, and especially to counties in view of later decisions by the Supreme Court which we shall presently have occasion to point out.

Since this decision, the Supreme Court and other courts of our state have manifestly been tending away from the rule there laid down and toward the rule holding that the statute does not run against the public or any subdivision of the state whenever the public highway or roads are involved.

In *Lane v. Kennedy*, 13 Ohio St. 42, the court held that an encroachment upon a township road (in Oxford township, Butler county) by fencing in a part thereof and occupying it for a period of twenty-one years would not bar the public authorities from recovering the land thus enclosed if the necessities of public travel thereafter required it. The *Evans* case was cited and commented upon by the court in this case. On page 48 the court says in commenting upon the effect of encroaching upon a part only of the highway:

"It must be borne in mind that, in the case at bar, the road was not closed up and the public thereby excluded from the use of the street."

In *McClelland v. Miller*, 28 Ohio St. 488, it was held that the enclosing by a hedge of a part of the untraveled portion of a public road, and the continuous and uninterrupted occupation of the enclosed portion thereof for twenty-one years, would not bar the public authorities to recover the enclosed portion of the public road.

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In *Little Miami Ry. v. Greene Co. (Comrs.)* 31 Ohio St. 338, it was held that the fact that a railroad company had erected abutments for its overhead crossing on a public road (as in the case at bar) within the limits of the highway but outside the traveled portion thereof, and had maintained them there continuously for a period of twenty-one years, was not a bar to an action of the county commissioners to compel their removal and recover possession of that portion of the public road upon which the abutments stood. It was there held that such structures, erected and maintained in the public highway, invaded rights both private and public and clearly constituted what in law is denominated a public nuisance. On page 349, the court in commenting on *Evans v. Cincinnati*, *supra*, says:

"I am aware that it was held in *Cincinnati v. Evans*, 5 Ohio St. 594, following *Cincinnati v. First Presbyterian Church*, 8 Ohio 298, that the statute of limitations runs against a municipality as fully as against natural persons, and that the question of title by adverse use to a small margin of a public street was involved in that controversy. Notwithstanding this, the case can hardly be held to maintain the doctrine contended for by the plaintiff in error here. It was not there intended to sanction a doctrine so palpably at variance with the whole current of authority."

The doctrine contended for was that, although these abutments were obstructions, encroachments and nuisances in the public highway, nevertheless, by maintaining them therein for a period of twenty-one years the railroad company thereby acquired the right to forever maintain them there as against the county commissioners.

In *Heddleston v. Hendricks*, 52 Ohio St. 460 [40 N. E. Rep. 408], it was held that the right of an adjacent landowner to enclose by a fence, however constructed, a portion of a public highway, can not be acquired by adverse possession, however long continued. This rule was applied to a township road and the court in deciding this case again referred to *Evans v. Cincinnati*, *supra*. The court says on page 465:

"The general rule is that the statute of limitations does not apply as a bar to the rights of the public, unless expressly

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named in the statute; for the reason that the same active vigilance can not be expected of it as is known to characterize that of private persons always jealous of his rights and prompt to repel any invasion of them. But in the case of *Cincinnati v. First Presbyterian Church*, 8 Ohio 298, and of *Cincinnati v. Evans*, 5 Ohio St. 594, a different rule was applied. * * * But these cases are regarded as exceptional; and confined to municipal corporations in cases where their possession has been disturbed by the erection of large and valuable structures under such circumstances as precluded the idea that the encroachment was simply permissive on the part of the municipality."

In the case of *Lane v. Kennedy*, 13 Ohio St. 42, the court on page 49 commenting on the *Evans* case, says:

"The decision might with equal, if not greater propriety, have been placed upon the ground of an estoppel *in pais* on the part of the city authorities; the building having been located by the city surveyor and upon lines previously established and built upon."

In the case of *Lake Shore & M. S. Ry. v. Elyria*, 69 Ohio St. 414 [69 N. E. Rep. 738], the railroad company was required to remove its abutments from a public street of the municipality where they had been maintained for a period of thirteen years under a contract or agreement with the council of the municipality to erect and maintain them there. The court in deciding the case held that neither the grant from the municipality, nor the statute of limitations, could be invoked to enable the railroad company to maintain these obstructions in the highway. On page 435, the court says:

"As to the plea of the statute of limitations made in the answer, it is sufficient to say that it is the well settled law of this state that encroachments upon a public highway never ripen into a title by adverse possession. nor is such title plead in this case."

It is fair to assume that if it had been pleaded the court would not have sustained the plea in view of the above quoted language and the other authorities to the same effect. We do

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not think it necessary or instructive to cite authorities on this point other than the decisions of our own courts.

In some states it is held that the statute of limitations runs against all divisions of the state but not against the state; in other states—and we may say that this is the rule adhered to by a preponderance of the authorities—the statute of limitations does not run against the public whatever division of the state may be involved as to its property held in a governmental capacity.

In view of the holdings of our own courts with reference to encroachments on highways and public roads, the court is of the opinion that the reasonable and safe rule to adopt and that which will eventually be adopted by our Supreme Court, is that no lapse of time will bar the public authorities in an action to recover the possession of lands belonging to a public highway or street, or to compel the removal therefrom of obstructions placed therein however long they may have been maintained and whether their character may be solid and permanent, or temporary and frail—and this rule will be applied to highways, streets or roads whether in municipalities, counties, townships or the state. There can be no distinction on principle between state roads, county or township roads and streets of a municipality, for in each and every case they are highways held by the public authorities as governmental agencies in their governmental capacity. The truth is that the ownership of all public highways is in the state, and it appears to be a departure from principle to hold that the statute of limitations applies to city streets or county roads and not to state roads. There is no more reason for exempting state roads from the operation of the statute of limitations than there is for exempting city streets and county roads therefrom.

Without pursuing the arguments further on this point, suffice it to say, the court is of the opinion that the statute of limitations should not under the recent decisions in this state, be applied to bar the city, county or township from a recovery of a part of the highway claimed to be held by adverse title for a period of twenty-one years or more under a claim of ownership.

Furthermore, whatever might be the rule where the entire

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width of the roadway or street is occupied, thereby cutting off entirely the public use of the highway, the rule as to encroachments merely, so long as the public does not need the entire width of the highway for travel, is different from that laid down where the entire width of the highway is taken.

But it is contended in the case at bar that this turnpike road, inasmuch as it was owned and controlled by a private company—Hamilton, Springfield & Carthage Turnpike Company—was not a public road or highway in the same sense as free county, township or state roads or streets in a municipality, until its abandonment in 1897, and that the rule applicable to public highways could not and should not be applied to this highway prior to 1897, and that defendant's right by adverse possession accrued long before that date, in fact in 1871 or 1872, twenty-one years after the abutments were erected.

Without commenting upon the following authorities, the court has come to the conclusion that so far as the public rights in toll turnpikes are involved, to keep the same open and free from nuisances, there is no distinction between such highways and free turnpikes, roads or streets. *Chagrin Falls & C. Plk. Road Co. v. Cane*, 2 Ohio St. 419; *Cuyahoga Co. (Comrs.) v. Plank Road Co.* 13 Dec. 747 (1 N. S. 143); *Commonwealth v. Wilkinson*, 33 Mass. 175 [26 Am. Dec. 654]; *Craig v. People*, 47 Ill. 487; *State v. Gravel Road Co.* 138 Md. 332; *Northern Central Ry. v. Commonwealth*, 90 Pa. St. 300; *State v. Maine*, 27 Conn. 641 [71 Am. Dec. 89].

Again, the charter of the defendant company, 44 O. L. L. 282, does not authorize it to use the highways or parts thereof in such a way as to interfere with the public use thereof; and now that the increased traffic on this highway, the construction of street car tracks therein, between the defendant's abutments and the public exigencies, require the use of the entire width of the roadway in the opinion of the county commissioners, it would seem strange that the defendant company, having erected these abutments without right or authority, should plead the continued existence of its own wrongdoing as a defense to the public demand that these nuisances be removed. The power and authority of any private corporation to do any act is to

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be determined by the grant of power contained in its charter. It may be remembered that in *St. Bernard v. Railway*, (no op.), the court of common pleas and the circuit court of this county held against the railroad company on its claim that it had acquired title to the land upon which a part of its abutments rested, by adverse possession for twenty-one years. This fact was admitted—that is, that a part of the abutments had been in place continuously for twenty-one years prior to the commencement of the action to compel their removal, and this claim of title by adverse possession was squarely raised in that case.

The difference between that case and the one at bar is in the character of the highway. In the case of *St. Bernard v. Railway*, *supra*, there was no question but that the Carthage pike was a free turnpike or county road. But if toll turnpikes, as to the public's rights of travel and use therein and thereon, are on the same footing as free county roads and free turnpikes, as the court believes the authorities cited hold, then there is no reason why the rule applied in the case just cited—although it be an unreported case—should not be applied in the case at bar.

On the grounds that the statute of limitations does not apply to the plaintiffs in the case at bar under the facts of the case and that no lapse of time can legalize a public nuisance, such as are the obstructions in the highway of the character of these abutments, under the authorities cited, the court finds that these abutments and the embankments behind the same within the limits of this sixty foot roadway, can not be maintained as against the plaintiffs, and the defendant will be enjoined from maintaining the same and be required to remove them and restore the roadway to its former condition for the full width of sixty feet, within one year from the date of the decree to be entered herein.

The prayer of the petition is granted.

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INSURANCE—PRINCIPAL AND AGENT.

[Hamilton Common Pleas, November 29, 1910.]

JOHN AND MARTHA MCBEE v. NATIONAL INS. CO.

1. Rules of the Common Law not Abrogated by the Howland Act.

The Howland act, Gen. Code 9586, prescribing that anyone soliciting insurance and procuring an application therefor shall be held to be the agent of the company thereafter issuing a policy on such application, anything in the policy to the contrary notwithstanding, was not intended to give to a mere solicitor of insurance all the powers of a general agent, or to change the rules of the common law as to the authority of an agent to bind his principal.

2. Promise of Solicitor of Fire Insurance that Provision of Policy Against Other Insurance Shall be Waived is not Binding on the Company.

Where it does not appear that a solicitor of fire insurance was authorized to waive the provision of the policy against other insurance, or that the agents who wrote the policy consented to such a waiver or had knowledge that other insurance had been placed on the same property, a petition for a reformation of the policy so as to provide for such waiver will be denied.

[Syllabus approved by the court.]

REFORMATION of policy.

Joseph T. Harrison, for plaintiffs.

Black & Black, for defendant.

SWING, J.

This is an action to have a fire insurance policy upon a dwelling house reformed so as to express what is alleged to have been the agreement of the parties.

John and Martha McBee, husband and wife, owners of a house and lot, obtained a fire insurance policy of defendant company, and very shortly afterward the house was destroyed by fire. At the time of the application for and issuing of the policy of defendant company there was other insurance in other companies upon the building insured, in large amounts, more than the whole value of the building as shown by the evidence. The policy of defendant company contains the following provision, to wit:

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"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

The policy also contains the following provisions, to wit:

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be indorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

No consent to other insurance and no waiver of the provision of the policy above quoted as to other insurance was written upon or attached to the policy.

The petition alleges that the policy was solicited by Albert Humphreys for the defendant, which executed the same on December 1, 1906, through its agents, John A. Pentland and Company, of Cincinnati, for whom said Humphreys was a solicitor; that Humphreys was informed of the other insurance, and "understood from plaintiffs that the policy to be taken should have the fact as to such other insurance indorsed upon or added to it," and that "such fact was communicated by Humphreys to Pentland and Company with a like request" before the execution of the policy, but the policy was issued and received by plaintiffs without any such indorsement upon it, and the premium was paid to Humphreys, and plaintiffs did not discover the omission until after the fire, which occurred the next day. Plaintiffs say the omission was by mutual mistake of the parties, and ask to have the policy reformed to conform to the said agreement. Humphreys was a solicitor of insurance,

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not in the employ of defendant, but occasionally taking applications to Pentland and Company, defendant's general agents. It is claimed by plaintiffs that Humphreys was the agent of the defendant by the terms of R. S. 3644 (Gen. Code 9586), "the Howland act." The terms of that section are quite broad and general, but I think it should be construed in the light of the preceding section and the real end and purpose of the act. The question as to the value of the property insured is one thing. That as to other insurance is another and different. An insurer is by the Howland act made liable for the whole amount of the insurance, regardless of the value of the building. But the provision as to other insurance, unless waived, will render the policy void, however small the amount of the other insurance may be, if there is any other insurance. I can hardly conclude that that section gives "a mere solicitor" all the powers of a general agent, as for instance the power to agree and bind the company to waive the provisions in the policy as to other insurance; as for example these provisions:

"Nor shall any privilege or permission affecting the insurance under the policy exist or be claimed by the insured unless so written or attached."

In Massachusetts there was a statute (Statutes of 1861, Chap. 170), as follows:

"Any person who solicits insurance on behalf of any fire or life company, whether chartered in this commonwealth, or elsewhere, or who transmits for any person other than himself an application for insurance or a policy of insurance to or from said company, or advertises that he will receive or transmit the same, shall be held to be an agent of that company to all intents and purposes and within the meaning of section seventy-seven of chapter fifty-eight of the general statutes, unless it can be shown that he receives no commission or other compensation or consideration for such service from the company."

In the present case Humphreys received a commission from the company, a share of the premium. This section is substantially and almost literally like R. S. 3644 (Gen. Code 9586) of Ohio, which also makes the solicitor the agent of the company.

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In the case of *Harrison v. Insurance Co.* 91 Mass. (9 Allen), 231, referring to said act, the court said:

"That enactment was not designed to change in any way the rules of the common law regulating the power of agents or their authority to bind their principals."

It also said of the solicitor:

"He was a special agent only, with strictly limited powers. He could not issue a valid policy or enter into contracts generally in behalf of defendants. He was authorized only to receive and forward applications, etc., to collect premiums, etc. Beyond this his authority as agent did not extend."

It is also said:

"It is no answer to say that he (plaintiff) had no knowledge of the limited extent of the agent's authority. This he was bound to ascertain," etc. And,

"No rule of law is better settled than that which requires a person who transacts business with a special agent to take notice of the nature and scope of the agent's powers." And, "If it were not so there would be no distinction between a special and a general agent. A principal would in all cases be at the mercy of his agent, however carefully and strictly he might have restricted his powers."

In *Markey v. Insurance Co.* 103 Mass. 78, the same thing is held. It is said, pages 78 and 79, after citing 9 Allen 231:

"The statute applies only to persons who assume to act as agents. It has no reference to or bearing upon the corporations themselves. It declares that such persons shall be held to be agents, 'to all intents and purposes to which the statutes apply to agents of insurance companies.' But it does not undertake to set forth their powers as agents; nor can it be supposed that it was the intention to clothe every person who should solicit insurance * * * with the full powers of a general agent of the company."

I have set forth the Massachusetts statute and decisions thus fully because they seem to me conclusive of the true construction to be given to R. S. 3644 (Gen. Code 9586), and as to the claim that knowledge of a mere soliciting agent of other insurance, or

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an understanding with him will bind the company to waive the provisions of the policy as to other insurance.

But Humphreys testified that he informed Pentland and Company, the general agents of the company who issued the policy, of the other insurance and understood that they were satisfied with it, though they omitted to indorse the consent on the policy. They gave it to him without the endorsement, and he so delivered it to plaintiffs, who were his neighbors. Pentland and Company, John A. Pentland and another, deny Humphrey's statement, and give their version of their conversation with him.

The law as to the proof required is stated in 2 May, Insurance Sec. 566 as follows:

"The evidence, however, in such case must be clear. If there be a substantial doubt as to what was the statement of the applicant, or as to the fairness of his claim to be mistaken, or the agreement of the parties, or a material conflict of testimony, the court will not aid the plaintiff."

There is in this case direct "conflict of testimony" on the essential matter, and I saw nothing in the testimony of Pentland and others on the stand to discredit them. Furthermore, considering the probabilities, it would be surprising if they had agreed to such a waiver as is claimed, knowing that the buildings were already insured for so much, far beyond their value. Besides, they being insurance men of experience and ability, would in all probability have endorsed the waiver on the policy if they had agreed to it, unless they wished to defraud the insured for their share of the small commission, which I could not assume. Furthermore, Humphreys himself was an insurance man of experience and must have known of the necessity of the endorsement of the waiver upon the policy, and being a neighbor of plaintiffs, would likely have seen to it that the endorsement was made as, he says, he had agreed to do, and informed Pentland and Company about it. But he took the policy and delivered it to plaintiffs without any endorsement upon it. Under the circumstances it can not be said that it is clearly proved that the fact of the other insurance was made known to Pentland and Company.

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I ought to say that the undisputed facts in the case are not calculated to cause one to look with favor upon the petition to reform the contract, unless the right to it should be clear.

The plaintiffs purchased the property, about two acres, November 1, 1906, agreeing to pay for it \$4,000. They paid \$300 cash and gave a mortgage for the balance, \$3,700. The ground, about two acres, was valuable. The buildings were old and of comparatively little value. December 1, 1906, they obtained insurance on the dwelling and some other out-houses, in two companies, amounting to \$3,080. December 3, 1906, they obtained the insurance with defendant company, making the total insurance \$4,230, or \$230 more than the purchase price of the whole property. December 4, 1906, the buildings burned. The testimony goes to show that the buildings were not worth more than from \$1,000 to \$1,500. Plaintiffs and Humphreys say (the latter now dead, but having given his deposition) that Humphreys solicited plaintiffs to permit him to get the insurance for them; that plaintiffs did not solicit Humphreys. This is not controverted in the evidence and I do not question it.

But I find, first, that Humphreys was not authorized to waive the provision of the policy as to other insurance; second, that it is not clearly proved that Pentland and Company agreed to waive the provision or that they knew of the other insurance when they issued the policy. The prayer for a reformation of the policy will therefore be denied.

AUTOMOBILES—DEATH—INFANTS.

[Franklin Common Pleas, March 24, 1911.]

*RAY S. BATES, ADMR. V. JOSEPH A. JEFFREY ET AL.

Owner of Automobile, Operated at Reasonable Speed, Overtaking Slowly Moving Wagon on Which Children are Riding and Jumping off, Not Bound to Anticipate One's Jumping in Front of Machine After Warning Given and Approach Assured.

The owner of an automobile, operated at reasonable speed, attempting to pass around a slowly moving wagon on which children were riding and jumping off, notice of its approach having

*Affirmed, no op., Jeffrey v. Bates, 88 O. S. 000; 58 Bull. 247.

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been given by blowing of its horn seventy-five yards away and its approach observed by the boy, is not bound to anticipate that a boy of seven years, riding on the wagon in a safe pace, will jump or fall in front of the automobile, especially where no noise is made by the machine to excite or frighten the boy, and no recovery can be had if under such circumstances the boy unexpectedly and suddenly gets in front of the automobile and is run over and killed.

[Syllabus approved by the court.]

MOTION to direct verdict.

M. B. Earnhart, for plaintiff:

As to manner of operation. *Bellefontaine & I. Ry. v. Snyder*, 18 Ohio St. 415 [98 Am. Dec. 175]; *Simeone v. Lindsay*, 6 Pewn. (Del.) 224 [65 Atl. Rep. 778]; *Thies v. Thomas*, 77 N. Y. Supp. 276.

Arnold & Gaine, for defendants:

Cited and commented upon by the following authorities: *Bellefontaine & I. Ry. v. Snyder*, 18 Ohio St. 399 [98 Am. Dec. 175]; *Simeone v. Lindsay*, 6 Pewn. (Del.) 224 [65 Atl. Rep. 778]; *Hallett v. Brewing Co.* 129 App. Div. 617 [114 N. Y. Supp. 232]; *Thies v. Thomas*, 77 N. Y. Supp. 276; *Skinner v. Knickrehm*, 10 Cal. App. 596 [102 Pac. Rep. 947]; *Theal v. Ice Co.* 9 Dec. Re. 163 (11 Bull. 122); *Liebrecht v. Crandall*, 110 Minn. 454 [126 N. W. Rep. 69]; *Castor v. Schaefer*, 224 Pa. St. 208 [73 Atl. Rep. 329]; *Brewster v. Barker*, 129 App. Div. 724 [113 N. Y. Supp. 1026]; *Jordan v. Coach Co.* 129 App. Div. 313 [113 N. Y. Supp. 786]; *Clifford v. Tyman*, 61 N. H. 508; *Bolton v. Colder*, 1 Watts (Pa.) 360; 1 Thompson, Negligence Sec. 1289; *Cincinnati St. Ry. v. Snell*, 54 Ohio St. 197 [43 N. E. Rep. 207]; 32 L. R. A. 276].

DILLON, J. (Orally.)

I have given more than usual time to the motion in this case. In fact, I have given it more time than I think any motion since I have been on this bench. It is my duty to do so in such a case as this. An accident of this kind appeals to the human side of a judge as well as to counsel and men generally, and it becomes the court, therefore, in such a case to exercise his judgment with the greatest care.

It is claimed on the part of the defendant by this motion

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that there is no evidence of negligence shown in this case. I am bound to take the same view that the defense has in this case, that there is not any evidence of negligence.

The evidence in this case is undisputed as to the fact that the horse hauling the milk wagon was walking, the driver of it, Barnes, in the front end, several boys inside, and the unfortunate boy on the step at the side; when about seventy-five yards away the driver of the automobile blew his horn; the little boy turned around and looked; it attracted his attention; he then stepped off of this slowly moving milk wagon; then he stepped back up again; the automobile continued to approach, and the driver blew his horn once more and started to coast around the wagon; the little boy stepped or jumped off. One of the witnesses, little Verner, says he was going over to the curb, and that is confirmed by the chauffeur, although those things occur so quickly that it is difficult to tell. But whether he jumped and stood or whether he was running toward the curb, the automobile stopped in about six feet. It shows, therefore, that the brake must have been applied immediately, because a car, such as a thirty horse-power Packard machine of that 1910 model, going at the rate of about six or seven miles an hour, would stop in that distance if the brake were immediately applied.

We have, therefore, but one claim on the part of plaintiff, which, boiled down, means this: that it was negligence for the driver of the machine to attempt to pass the wagon with the boy there, for the reason that the nature of a child is such that it is apt to jump off or liable to do this or that, and that for that reason the driver is bound to anticipate that a child might jump off and he should not attempt to pass the wagon. If we carry that doctrine to its legal conclusion it simply means that no one driving a street car or a horse and buggy or an automobile would dare pass any other vehicle containing children. Here is a man driving his horse and buggy along the street and a child is standing on the curb; he is liable to run out. If he suddenly jumps out and the person driving the vehicle was not guilty of any negligence at the time, it is a mere accident. The chauffeur, therefore, was bound under the law to exercise reason-

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able care. It was not negligence for him to be running his machine at the rate of about six miles an hour. It was not negligence for him to try to pass the milk wagon in the proper way. There is no evidence here that he attempted to pass in an improper way.

If I could see the allegations of this petition sustained by a scintilla of evidence to the effect that the machine came up in such a manner as to frighten the child, making a noise, blowing the horn or making some noise suddenly without warning in such a manner as to frighten the child, there would be no question about that, because that will frighten a man as well as a boy. A man might jump under those circumstances. But in this case that allegation is not sustained. On the contrary, the evidence shows that the machine was not making an unusual noise; none of the witnesses heard the noise. But it did not make enough noise to attract the attention of the boys inside or the driver, so far as the evidence here shows, although Barnes has not testified.

The motion, therefore, must be sustained.

MASTER AND SERVANT—PLEADING.

[Hamilton Common Pleas, April 5, 1912.]

BRUNO WALTER V. AMERICAN SOAP CO. ET AL.

Allegation Saving Plaintiff from Rule Denying Volunteer's Right to Maintain Action for Damages for Personal Injuries.

-An employe of a landlord assisting the foreman of a tenant upon application of the tenant and at the request and for the beneficial interest of the landlord is not acting as a mere volunteer, hence, a petition in an action for personal injuries naming plaintiff's employer and a tenant thereof as defendants and alleging injury while he was assisting the foreman of such tenant at the request of the foreman and direction of, and being beneficial to plaintiff's employer, is good as against demurrer by the tenant.

[Syllabus approved by the court.]

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DEMURRER to amended and supplemental petition.

Gustav R. Werner, for plaintiff.

Galvin & Bauer, for defendants.

GORMAN, J.

A demurrer was filed to the petition herein some time ago, on the ground of a misjoinder of parties defendant, and on the ground that the allegations of the petition do not show facts sufficient to constitute a cause of action against American Soap Company, defendant.

I sustained the demurrer to the petition on both grounds. Thereupon the plaintiff amended his petition, and filed what he calls an amended and supplemental petition against the American Soap Company only, without asserting any claim or cause of action against the other defendant, Brankamp.

The original petition filed against the defendants undertook to hold the American Soap Company and Lewis S. Brankamp, its general manager. The petition also disclosed that the plaintiff who claimed to have been injured while lifting a barrel of soft soap belonging to the defendant company by reason of the negligence of Brankamp, was a mere volunteer, and I held that as such he could not recover against the company for any damages which he sustained while thus acting. In his amended and supplemental petition, plaintiff has set up allegations, which to the mind of the court discloses that he was not a mere volunteer. He alleges that at the time of the injuries which he sustained, he was in the employ of Albert and Mary Eckerlein; that the defendant company was a tenant of Albert and Mary Eckerlein, at No. 11 West Clifton avenue, Cincinnati, Ohio; that Lewis S. Brankamp was the general manager of the defendant company; that he requested Albert and Mary Eckerlein to permit the plaintiff to act with him, Brankamp, for the purpose of delivering a barrel of soft soap weighing about 700 pounds, to one George Hammerding, at Vine and Elder streets in Cincinnati. He further avers that his employers, Albert and Mary Eckerlein, requested him, the plaintiff, to comply with such request and to accompany Brankamp

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and assist him in the delivery of the soap. He further avers that at this particular time when the request was made of him to accompany said Brankamp, the said Brankamp was the general manager of the defendant company, and as such general manager, he had the power and authority to employ servants on behalf of the defendant company, to direct and control their movements and to discharge them when he saw fit. He then sets out the manner in which he was injured.

There are two cases in Ohio which touch upon this proposition of the liability of a defendant to a plaintiff who was injured under some such circumstances. *McIntire St. Ry. v. Bolton*, 43 Ohio St. 224 [1 N. E. Rep. 333; 54 Am. Rep. 803]. *Cleveland Term. & V. Ry. v. Marsh*, 63 Ohio St. 236 [58 N. E. Rep. 821; 52 L. R. A. 142].

The question to be determined in this case is whether or not the plaintiff was a mere volunteer at the time he was injured. The allegation as to the authority of Brankamp to employ plaintiff as the general manager of the company, and that it was at the request of the plaintiffs' employers, Albert and Mary Eckerlein, that he accompanied Brankamp and assisted him in delivering the soap, whereby he was injured, did not appear in the original petition.

Judge McIlvain, in *McIntire St. Ry. v. Bolton*, *supra*, says:

"It is also well settled that a person who without any employment voluntarily undertakes to perform service for another, or to assist the servants of another in the service of the master, either at the request or without the request of such servants, who have no authority to employ other servants, stands in the relation of a servant for the time being, and is to be regarded as assuming all the risks incident to the business."

Now this case at bar is distinguishable from the case of *Cleveland Term. & V. Ry. v. Marsh*, *supra*, and is similar to the case of *McIntire St. Ry. v. Bolton*, just cited, because Brankamp, the general manager, is alleged to have had authority to employ servants for the prosecution of his employer's or master's business, the defendant company. It is also alleged that the plaintiff did not act voluntarily, but at the direction

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and request of his own employers, and this, we think, takes the case out of the class of a mere volunteer.

This question was present in the case of *Eason v. Railway*, 65 Tex. 577 [57 Am. Rep. 606].

In that case the facts averred were that the plaintiff was not an employe of the railway company, but he was in the employ of the owners of a mill that shipped lumber by the railway company's cars. The plaintiff's business was to load lumber on the cars for his employers, the owners of the mill. The car which he attempted to couple to the train was placed in the situation it occupied for the purpose of being loaded with lumber by the servants of the owners of the mill. The car was so located that it could not be conveniently loaded, and to have it hauled upon the track was a matter of interest to the plaintiff's employers. This fact was called to the attention of the conductor of the train by the plaintiff himself, acting on behalf of his employers, the owners of the mill. The conductor being short of brakemen, asked the plaintiff to couple the car desired, to the one immediately in front of it, which the plaintiff consented to do, and in doing this received the injury complained of, through the negligence of the engineer. The service the appellant was performing at the time was in furtherance of the master's interest in having the car placed where it could be loaded more conveniently, and, hence, expedited in starting for the destination of the lumber. He was still acting in the capacity of a servant for Carlisle and Snelling, the owners of the mill; was doing so at the request, and, of course, with the permission of the defendant company. A demurrer was interposed to this petition and sustained by the lower courts upon the theory that the plaintiff in the case was a mere volunteer. The Supreme Court reversed the lower court and held that it was error to sustain the demurrer.

I think that the averments of the amended and supplemental petition in the case at bar bring the plaintiff's case well within the rule laid down in *Eason v. Railway*, *supra*. See also the case of *Wright v. Railway*, 1 Q. B. Div., 252.

In view of the changed averments in the amended petition, I am of the opinion that the demurrer should be overruled.

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It is a close case at best, and turns upon the question of whether or not the assistance rendered by the plaintiff to the defendant company at the request of Brankamp was a benefit to the plaintiff's employers, Albert and Mary Eckerlein. It certainly was no benefit to himself, but inasmuch as he was in the employ of Albert and Mary Eckerlein, and the defendant company was a tenant of theirs in their premises, and it is averred that it was for their interest and beneficial to them, that the plaintiff should assist the defendant company, I am of the opinion that these averments are sufficient to make the amended and supplemental petition proof against the demurrer.

The demurrer will therefore be overruled.

MUNICIPAL CORPORATIONS.

[Licking Common Pleas, January Term, 1910.]

HARRY M. VERRILL v. NEWARK (CITY).

Neither Action on Contract, Quantum Meruit or for Tortious Conversion Lies against Municipality If Statutory Requirements are not Complied with.

An action will not lie against a municipality for recovery on a claim not contracted under a written agreement and for more than \$500, either on contract, quantum meruit, or for tortious conversion, if the provisions of Gen. Code 4328 and 4331 have not been complied with.

DEMURRER.

Smythe & Smythe, for plaintiff.

Frank A. Bolton, city solicitor, for defendant.

SEWARD, J. (Orally.)

This is a suit to recover for water furnished to the citizens and to the city of Newark. A demurrer is interposed to the petition, because there is a misjoinder of causes of action.

The petition contains five different causes of action. The first one seeks to recover upon a contract, as is alleged, made by the board of public service with Verrill for the furnishing of water. It is alleged that an appropriation was made by the

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city council to pay for the water that was furnished; that a contract was made by the board of public service, and that the water was furnished, and that an appropriation was made by the city council for payment for the water furnished. The second cause of action seeks to recover upon a *quantum meruit*. The third cause of action is for a tortious conversion. It alleges that the city took charge of the water plant of the plaintiff, appropriated it to its own use, and took the water and converted it to its own use; and seeks to recover for a tortious conversion of the water. The fourth cause is that the city required the plaintiff to furnish water, and that he had no option, but was compelled to furnish it; and seeks to recover for that reason—by reason of being compelled to furnish the water.

It is undoubtedly a true proposition of law, that the plaintiff can not recover in this case, unless the contract is in writing; and there is no allegation that this contract is in writing. There must be a contract before the city can be held liable. I see that this is a hardship upon the plaintiff in this case, but persons who seek to enforce claims against a city or county must, at their peril, comply with the law governing in such matters. The law governing in this case is Gen. Code 4328 and 4331.

The court does not think that the section of the statute giving power to the city council, or to the board of public service, to regulate the rates of water, has anything to do with this cause of action. That section has nothing to do with it. That is, the section giving the city the power to regulate the rate for water.

Gen. Code 4328 *et seq.* are the sections that control in this matter; and it is utterly impossible to hold the city on a *quantum meruit*, in such cases as this, or for a tortious conversion.

There is a misjoinder of causes of action here—an action for a tort, and upon contract, and upon a *quantum meruit*. There is certainly a misjoinder of causes of action; and the causes of action altogether state no ground for relief on the part of the plaintiff. The court is very sorry that the carelessness in making the arrangement requires it to hold that way, because if the city has taken the water of the plaintiff, under a contract, he ought to be paid for it, from a moral standpoint at least.

The demurrer may be sustained.

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COMMERCE—RAILWAYS.

[Franklin Common Pleas, ———, 1913.]

PENNSYLVANIA CO. ET AL. V. PUBLIC SERVICE COMMISSION ET AL.

1. **Public Service Commission Law Involves the Police Power, its Interpretation is Governed by Prevailing Morality and Preponderant Public Opinion not Contrary to Common Standards of Justice.**

The paramount purpose and design of the public service commission law passed by the legislature in the exercise of the police power was to regulate the public duties of public utilities not within the jurisdiction of courts. The latter have power to interfere with regulatory acts of the commission only when such corporate public utility is deprived of its property without due process of law, or its property is taken without just compensation. Because of the varying quantity of police power its scope is differently interpreted than are other specific constitutional provisions. Being the expression of social and economic conditions, courts when called upon to review such legislative acts must search for principles of constitutional morality from new and various experiences of present times and existing circumstances, because such power is limited only by public need, and the prevailing morality and strong and preponderant public opinion, from its nature incapable of exact definitions. Courts must therefore apply the same rule of opinion in judicial expression in determining whether a legislature has deprived a person of his property unlawfully. Due process and police power should parallel each other in their lines of morality; and if the legislative act shall be found upon an analysis not to deprive one of his property in a way contrary to common standards of justice, it shall be deemed to come within the police power, and hence it will not violate the "due process" clause.

2. **Order of Public Service Commission Requiring Connecting Track between Two Railways, Public Necessity Requiring It, Valid and Jurisdictional.**

An order of the public service commission requiring two railway companies to construct a connecting track between their lines, the public necessity and mutual benefit being apparent, is within its jurisdiction and amply warranted by Gen. Code 522 and 614-42, requiring railway companies to afford reasonable and proper facilities for interchange of traffic; since the duty of the railway companies is coterminous with their corporate powers, the obligation to discharge such duty must be considered in connection with the nature and productiveness of their corporate business as a whole, the character of the services required and the public need for its performance; and the fact that the cost of furnishing such necessary facility may occasion an incidental pecuniary loss, while an important criteria for consideration in determining the reasonableness of

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the order, is not of such controlling effect as to make the regulation a taking of property without just compensation.

[Syllabus approved by the court.]

INJUNCTION.

Henderson, Livesay & Burr, for plaintiffs.

Hon. T. S. Hogan, Atty. Gen., and *Durban & King*, for defendants.

KINKEAD, J.

The plaintiff complains that on September 18, 1912, the Public Service Commission upon complaint and investigation made a finding and order requiring that in the future the plaintiff shall construct and maintain a transfer or connecting track between the respective tracks of plaintiff and defendant companies in a suitable place in or near the municipality of Wooster, that will enable each of the railroad companies, the plaintiff and defendant companies herein, to deliver to the other, cars, either empty or loaded, or both empty and loaded, in order that such cars may be switched or transferred and transported in road haul to the desired and designated destination, and in order that cars bearing incoming freight may be properly placed for unloading; that the transfer and connecting track shall be so located, constructed and maintained as to admit of the passage of cars, with facility, from the rails, track and road of each of said defendant companies to the rails, track and road of each of the other defendant companies.

The plaintiff companies are dissatisfied with the order so made and by this action seek to have the same vacated and set aside, and have the Public Service Commission perpetually enjoined from bringing any suit, action, or prosecution against plaintiffs the object or purpose of which may be to put the order into effect, for the reasons, and on the grounds following:

(1) The order was without authority, statutory or otherwise; hence, the commission was without jurisdiction.

(2) The order is void for indefiniteness.

(3) The same was made without proper consideration of the places and persons interested, or the volume of business.

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- (4) It was not justified by a public necessity.
- (5) It was against the weight of the evidence.
- (6) It will require an expenditure of money without adequate return.

(7) It will deprive plaintiffs of their property without due process of law, and it will be a taking of property for public use without just compensation contrary to the constitution of the United States and of Ohio.

The public service commission answers, admitting the order but in effect questions the legal sufficiency of the claims asserted by plaintiffs.

The complainant before the commission was the Canton-Hughes Pump Company and others. They complain that the railroad companies wholly failed to furnish proper facilities for the interchange of traffic between their lines, and for forwarding and delivering freight and property; that they wholly failed to provide switching facilities and tracks necessary for transferring and delivering carload lots and empty cars for loading freight. The evidence discloses that there are a number of business concerns in the city of Wooster interested in the interchange of traffic, some of them located on the B. & O. Ry. Company, and some on the Pennsylvania road. Such concerns can not as conveniently ship or receive carload lots on the road on which they are located. The railroads were of equal gauge and pass into and through Wooster, the tracks of each crossing the other in or near the municipality. The commission found that the business conducted by the complainants, as well as that of other persons, is located contiguous and near to the tracks. The order was that the "defendant companies" construct and maintain the transfer and connecting track between the tracks of the companies. But only the Pennsylvania Company prosecutes this action. Section 543 of the Public Service Commission act permits a railroad company, if dissatisfied with an order of the commission, to institute an action in court against the commission to vacate and set aside an order made when the regulation, practice or service fixed is unlawful or unreasonable.

Such provision and remedy is essential to the validity of

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the enactment in order not to give the commission final power so as to avoid and prevent it from making orders affecting rights which are within the exclusive domain of the co-ordinate judicial branch of government. Such rights are those, the power to adjudge which is given by the common law, written constitutions, and statutes. In considering the respective powers and duties of the commission and of courts concerning such matters as come within the purview of the enactment, it is essential to distinguish between common law and constitutional rights and regulations so as to avoid confusion of thought. The former railroad commission law was called in question because it was claimed to infringe upon the constitution by conferring judicial power upon the commission, which, of course, may not be done. In upholding its validity in *Baltimore & O. Ry. v. Railway*, 21 Dec. 468 (10 N. S. 665), we endeavored to point out the lines of demarcation between judicial power, and that conferred upon executive or administrative bodies merely to ascertain, hear and decide questions of fact, apply the rule of the statute thereto, and enforce the same. See also *France v. State*, 57 Ohio St. 17 [47 N. E. Rep. 1041].

But there is now need of further elucidation to clearly perceive the purpose of the law, both as to the duties of the court and of the commission.

The design of the enactment being executive or administrative in character, it having been passed by the legislative branch of government in the exercise of the reserved police power, the paramount purpose was to regulate the public duties of railroad corporations as quasi-public utilities. There was no intent to empower the commission to hear and settle private controversies between individuals and railroad companies, nor to usurp the function of courts by entertaining legal inquiries concerning the exercise of corporate franchises. It has been appropriately observed by our court of highest resort that at common law the courts would be without power to make orders such as are made by railroad commissions, like ordering that equal and reasonable facilities be afforded for the interchange of cars and traffic between intersecting lines. Legislative authority to do these things is essential, the court stated. *Wisconsin, M. & P. Ry. v.*

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Jacobson, 179 U. S. 287 [21 Sup. Ct. Rep. 115; 45 L. Ed. 194]. And the legislation we now have before us commits to the commission executive or administrative powers and duties only, and to courts such judicial power and duties as are already conferred by the constitution. This is done to guard against an unlawful application of a rule or regulation prescribed by the enactment to facts and conditions in such manner and under such circumstances as may infringe upon or violate the right of property protected by the constitution.

This law being the product of the reserved police power of the state, the power of the courts to interfere with regulatory acts imposed by the commission in pursuance thereof, is limited to violations of specific guarantees of the constitution, namely, that no person shall be deprived of his property without due process of law, or that it shall not be taken for public use without just compensation.

Because police power is a varying quantity; and because what constitutes a taking of property without just compensation, or a deprivation thereof without due process of law, is also of like nature, depending as it does upon particular facts, circumstances and conditions, and the application of the particular view or opinion, the result is a fruitful field for controversy.

For these reasons the scope of police power is to be differently interpreted than that of other specific constitutional questions. So, the power of courts respecting such matters of regulation in pursuance of police power, is to be viewed in different light from that concerning other specific questions of fundamental law. It would be fortunate, indeed, if the mental faculties of legislative, administrative and judicial officers of government were so attuned as to produce harmony of opinion. Police power being but the expression of social, economic conditions; the characteristic principle of the common law being to draw its inspiration from every fountain of justice, so has it always been, and is now, the duty of legislatures and of courts to search for principles of constitutional morality from new and various experiences of present times and existing circumstances and conditions. This power being defined and limited only by

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the great public needs, or the interests of a community, or the prevailing morality and strong and preponderant public opinion, a power which is and must from its nature be incapable of exact definition, so is it, therefore, always the duty of courts to apply the same rule of opinion in judicial expression in determining whether an enactment of a legislative will has or has not deprived a person of his property without due process of law, or whether it has taken property without just compensation. See *Noble State Bank v. Haskell*, 219 U. S. 104, 111 [31 Sup. Ct. Rep. 186; 55 L. Ed. 112; Ann. Cas. 1912 A. 487]; *Hurtado v. California*, 110 U. S. 516 [4 Sup. Ct. Rep. 292; 28 L. Ed. 232].

The sole question to be decided in this case, therefore, is whether the act of enforcement of the regulation of the statute under the facts and conditions shown by the record is violative of the constitutional rights of the railroad company. The matters committed to the commission for the exercise of its enforcing powers in so far as they do not come within the above mentioned guarantees are not subject to review, or rather we may say not subject to change by courts, because it is but the application of the paramount legislative will, which is beyond the power of control by courts in such case.

Under Gen. Code 543-547 the court must then only determine whether the order made by the commission is so far unreasonable as to be in violation of the provisions of the constitution. It is not merely to express its opinion concerning a question of reasonableness disassociated from constitutional guaranty.

There are certain definitions to be kept in mind in weighing the facts and circumstances by the measure of the constitutional guarantees: First, is property, thus protected against invasion unless due process is had, or just compensation be made. The great purpose of organized society is the security of property, which simply means anything which a person owns, or the free use and enjoyment by a person of all his acquisitions, without any control or diminution, save only by the law of the land. *Watson*, Constitution 1456; *Stevens v. State*, 2 Ark. 291 [35 Am. Dec. 72].

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Concerning "due process," there has been much discussion recently as if its meaning was in some doubt. There are those who regard it as a mere legal concept, having relation only to "procedure," and not to matters of the substantial justice of results reached; that it has come to include the element of just compensation only by a process of judicial amendment to the constitution; that property shall not be taken, except by procedure in accordance with the fairness and regularity of Anglo-Saxon jurisdiction, upon notice and a hearing; that the original purpose was alone to prevent the legislative branch of government from arbitrarily seizing property without legislative act, or notice, or hearing; that property shall not be taken by legislative act which violates fundamental ideas of justice.

We believe that "due process" and "police power" should parallel each other in their lines of morality and justice, that if any legislative act, not in conflict with some specific constitutional prohibition, shall be found upon analysis not to deprive one of his property in a way contrary to common standards of justice, it shall be deemed to come within the police power, and, hence, it will not violate the "due process" clause. But due process without considering the results attained thereby is not all there is in the legal conception. There must be, it is true, some method of procedure provided to ascertain the facts and apply the regulation, but courts may not be deprived of final authority to maintain the supremacy of constitutional rights. The morality and justice maintained by expression of the police power, and by the judiciary, ought to meet the same required standard, but being the offspring of human endeavor, either is liable to err. So in this case the question is whether the legislative agency, the commission, has erred in ordering property taken for public use without due process or just compensation. If it has, the court has a duty to perform; otherwise, it may do nothing more than dismiss the action.

Due process means not alone the orderly course of procedure in accordance with the fundamental ideas of fairness and regularity obtaining in Anglo-Saxon jurisdictions, involving due notice, and opportunity to be heard, and some regularity, of course, of action, but it means as well that the order made by

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an administrative or executive body enforcing the legislative regulation shall not so unreasonably do so as to take property for public use without just compensation. Furthermore, an order made by such a body requiring a railroad company to expend money and use its property in a specified manner is a taking of property, and to be valid there must be more than mere notice and opportunity to be heard; the order itself must be justified by public necessity, and not unreasonable or arbitrary. *State v. Fairchild*, 224 U. S. 510 [32 Sup. Ct. Rep. 535; 56 L. Ed. 863].

Administrative process of a customary sort is as much due process of law as judicial process. *Cooley*, Const. Lim. p. 214; *Watson*, Constitution 1452. Executive orders may also be due process of law. *Public Clearing House v. Coyne*, 194 U. S. 497 [24 Sup. Ct. Rep. 789; 48 L. Ed. 1092]. Due process is designed to afford opportunity for a hearing for the purpose of fully developing the facts, so that public necessity must be determined, and just compensation may be awarded for property taken.

In *State v. Fairchild*, *supra*, the Washington Railroad Commission law authorized a hearing of a complaint for additional trackage and connections. A hearing was had at which evidence on both sides was offered. An order was made requiring a track connection. Proceedings were had in the state courts under a statute requiring it to be heard on the same evidence taken before the commission. The cost was put at from \$316 to \$1460 and aggregating about \$7000 by the evidence taken before the commission. Evidence was offered in the trial to the court that instead the cost would be \$21000 besides expenses for acquiring land. The evidence could not be received under the statute, but the court was not bound by the order made by the commission. The record failed to show what, if any, business would be routed over the connections, or what saving would come to the public. There was nothing by which to compare the advantage to the public with the expense to the defendant and nothing to show such public necessity within the meaning of the law as to justify the taking of the property. So the judgment was reversed, because the regulation was unreasonable.

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The power of a state, acting through an administrative body, to require competing railroad companies to make track connection under proper conditions and circumstances was recognized in *Wisconsin, M. & P. Ry. v. Jacobson*, 179 U. S. 287 [21 Sup. Ct. Rep. 115; 45 L. Ed. 194]. It appeared in that case that on one of the lines there was an immense supply of wood, for which there was a great demand at points on the other, where there was none, and that if the connecting track was installed there would be a saving in time and freight on this large volume of business. It also appeared that many cattle were raised on one line, for which there were important markets on the other, and that without the track connection these cattle would have to be hauled over a much longer route, with a resulting loss in weight and value. The advantage to the public was so great that the order requiring track connection was sustained, in spite of the fact that one of the roads was thereby deprived of the revenue which it would otherwise receive for the longer haul.

In considering the evidence taken before the commission as to the connection in question, in the case at bar, looking to the population of the locality and the varied business interests, whose convenience and needs will be greatly subserved by the interchange of trackage, we consider the order from the point of view of the requirements of the public interests, as one coming clearly within the scope of the power to enforce just and reasonable regulation. There is located on the Pennsylvania line a manufacturer of large waterworks pumps, difficult to ship, except by loading directly on the cars. It has an incoming traffic of about 3,000 tons of brass and other items of probably 1,000 tons, and has need of getting shipment of materials and supplies over the other road; there is also a lumber company shipping eight to ten carloads of finished products per month, which would have better facilities with the interchange of traffic; also a coal company which receives 412 cars per year, and which could have a greater open market with the switching facility.

On the B. & O. Railway line is located a milling establishment, contemplating a new mill if the switch be installed, having now an output of 80,000 bushels of grain per year, an in-

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bound of eighty-six carloads in six months, and an outbound in full carloads of forty-five. An interchange of cars would dispense with much hauling. There is also located on the B. & O. another dealer in coal and builders' supplies which receives 280 cars per year and is without as good facilities for getting coal and material; also on same road is a brick company with capacity of 20,000 paving brick, and 5,000 to 10,000 wire cuts daily, with 350 to 550 cars out and 100 to 200 cars of coal in; also a sand handling machinery and molding sand concern with plant one mile south of the city.

The testimony does not undertake to show how much proportionate advantage there may be either to the companies mentioned or to the railroad companies. That would involve speculation, but from the facts produced it appears that the track connection would be of great mutual benefit to both as well as the public. It appears from the testimony of the witnesses on both sides that the chief controversy is concerning the cost of the improvement. The railroad companies were willing to make the improvement but for the cost. The estimated cost for scheme No. 1 is \$5400, exclusive of lands; for scheme No. 2 \$3100, exclusive of lands; for scheme No. 3 \$5370, exclusive of land. Land belonging to the Pennsylvania could be used, it appears, for one of the schemes. The expense is to be divided between the two companies. The B. & O. Ry. Company is evidently satisfied for it is not prosecuting this action.

The public necessity being made clear, the only question is the one of cost. Does the matter of cost have such controlling effect as to make the regulation a taking without just compensation? We think not. The distinction is made clear between a regulation by a general scheme of regulation as to rates which will not produce an adequate return for the operation of a railroad as an entirety, and one where the question is as to the validity of an order to do a particular act, the doing of which does not necessarily involve the question of profitability of the operation of the railroad as a whole. *St. Louis & S. F. Ry. v. Gill*, 156 U. S. 649 [15 Sup. Ct. Rep. 484; 39 L. Ed. 567]; *Minneapolis & St. L. Ry. v. Minnesota*, 186 U. S. 257 [22 Sup. Ct. Rep. 900; 46 L. Ed. 1151]; *Smyth v. Ames*, 169 U. S. 526

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[18 Sup. Ct. Rep. 418; 42 L. Ed. 819]. A regulation concerned only with an order directing a carrier to furnish a facility which is part of its general duty to furnish for the public convenience, may well be compelled although by doing so as an incident some pecuniary loss from rendering such service may result. It follows that the mere incurring of a loss from the performance of such duty does not in and of itself necessarily give rise to the conclusion of unreasonableness as would the case where the whole scheme of rates was unreasonable. Of course, the fact that the furnishing of a necessary facility ordered may occasion an incidental pecuniary loss is an important criteria to be taken into view in determining the reasonableness of the order, but it is not the only one. As the duty to furnish facilities is coterminous with the powers of the corporation, the obligation to discharge that duty must be considered in connection with the nature and productiveness of the corporate business as whole, the character of the services required, and the public need for its performance. Although to carry out the order and judgment it may require the exercise of the power of eminent domain and will also result in some, comparatively speaking, small expense, yet neither fact furnishes an answer to the application of the regulation. *Wisconsin, M. & P. Ry. v. Jacobson*, *supra*, quoted in *Atlantic Coast Line Ry. v. Corporation Commission*, 206 U. S. 1 [27 Sup. Ct. Rep. 585; 51 L. Ed. 933; 11 Ann. Cas. 398].

The power or right of the commission in this case to make the specific order to require the companies to construct the connecting track is questioned as a matter of construction of statute. Our conclusion is that Gen. Code 522 and 614-42 furnish ample warrant for the exercise of such power. By these two provisions steam railroad companies are required to afford reasonable and proper facilities for interchange of traffic between their respective lines. The fact that Gen. Code 614-42 authorizes the commission to hear a complaint against any road or roads that neglects or refuses to make a connection clearly shows that the provisions of that section are mandatory, that "may" means "shall."

The conclusion is that the regulation is not so unreason-

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able as to be in violation of constitutional right, and the action is, therefore, dismissed.

DESCENT AND DISTRIBUTION.

[Hamilton Common Pleas, 1913.]

ALICE FAY, ET AL. V. JOHN M. SCOTT, ET AL.

1. Husband, Relict of Wife Deceased Intestate, Seized of Estate of Former Husband Deceased, Intestate without Issue, Takes Dower Only.

A husband, relict of a wife who died intestate seized of an estate coming to her, under Gen. Code 8574 (R. S. 4159) from a former husband who died intestate, survived by such wife, without issue, has a dower interest only in his deceased wife's estate and not a life interest. *Spitler v. Heller*, 42 Ohio St. 100, distinguished.

2. Realty of Deceased Wife Descending from Former Deceased Husband Passes as Ancestral Property, Save Dower Interest of Surviving Second Husband.

The real estate of such deceased wife upon her death without issue, she having title to such real estate from a former deceased husband, passes to and descends, under Gen. Code 8577 (R. S. 4162) one-half to the brothers and sisters of such wife and one-half to the brothers and sisters of the deceased husband, subject to the dower interest of the second, surviving husband.

[Syllabus by the court.]

DEMURRER to petition.

F. H. Oehlmann, for plaintiffs.*Joseph Lemkuhl* and *Frank H. Kunkel*, for defendants.

MAY, J.

The plaintiffs filed their petition setting forth that they are the brothers and sisters of James Lyons, who died intestate Oct. 24, 1889, without children, leaving surviving him his widow, Mary Lyons, and that at the time of his death he was seized in fee simple of a piece of real estate which he had acquired in his lifetime by purchase; that his widow Mary Lyons, afterward intermarried with the defendant John M. Scott, and that Mary Scott, who was

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the widow of James Lyons, died intestate without issue, survived by her second husband, John M. Scott. Plaintiffs further say that the defendant John Bolan is the only surviving brother of Mary Scott, deceased. Plaintiffs say that by reason of the death of Mary Scott, intestate, seized of the property which came to her from her former husband, that they as brothers and sisters of said former husband, James Lyons, are entitled to one-half of the real estate and that John Bolan as the surviving brother of Mary Scott, is entitled to the other half of said real estate, and pray for partition. Also, that John M. Scott, husband of Mary Scott, be required to set up what interest he had in the property.

To this petition the defendant John M. Scott has demurred on the ground that the petition does not state facts sufficient to constitute a cause of action.

On the argument it was claimed on behalf of John M. Scott that he had a life estate in the property described in the petition, under Gen. Code 8573, (R. S. 4158) which reads:

“When a person dies intestate, having title or right to any real estate or inheritance in this state, which title came to such intestate by descent, devise, or deed of gift from an ancestor, such estate shall descend and pass in parcenary to his or her kindred * * *. If there are no children or their legal representatives living, the estate shall pass to and vest in the husband or wife, relict of such intestate, during his or her natural life.”

This section is not in point. The estate which vested in Mary Lyons, who afterward intermarried with John M. Scott, vested in her in fee, under Gen. Code 8574 (R. S. 4159).

“If the estate came not by descent, devise, or deed of gift, it shall descend and pass as follows: If there are no children, or their legal representatives, the estate shall pass to and be vested in the husband or wife, relict of such intestate.”

Under the decisions of this state, the estate inherited by a wife from a husband, who had acquired the estate in his lifetime by purchase, passes under this latter section, and the deceased husband is not an ancestor in the meaning of the word as used in Gen. Code 8573 (R. S. 4158). *Brower v. Hunt*, 18 Ohio St.

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311; *Lathrop v. Young*, 25 Ohio St. 451; *Stembel v. Martin*, 50 Ohio St. 495 [35 N. E. Rep. 208].

Under Gen. Code 8577 (R. S. 4162):

"When the relict of a deceased husband or wife dies intestate and without issue, possessed of any real estate or personal property which came to such intestate from a former deceased husband or wife by deed of gift, devise or bequest, or under the provisions of Gen. Code 8574 (R. S. 4159), then such estate, real and personal, shall pass to and vest in the children of such deceased husband, or wife, or the legal representatives of such children. If there are no children or their legal representatives living, then such estate, real and personal, * * * shall pass and descend, one-half to the brothers and sisters of such intestate, or their legal representatives, and one-half to the brothers and sisters of such deceased husband or wife from which such personal or real estate came, or their personal representatives."

If the deceased wife is survived by a second husband, he naturally would have his statutory rights in the property. The defendant contends that under the decisions of the Supreme Court in the case of *Spitler v. Heeter*, 42 Ohio St. 100, the surviving husband is entitled to a life estate. There can be no doubt whatsoever, but that the Supreme Court did decide, at page 102:

"Louisa, at the time of her death, was 'the relict of a deceased husband,' Sebastian Heeter; and section 4162 of the Revised Statutes determines the descent of this land, and gives it to the defendants, subject to plaintiff's life estate."

This case, however, was decided in the January term, 1884, of the Supreme Court, and at that time there was in force in the state of Ohio, statutes by which a husband upon the death of his wife had an estate of curtesy in her real estate, but in 1887, by the provisions of R. S. 4194-1, 84 O. L. 132, 136 (R. S. 4194-1; Gen. Code 8614), the estate by curtesy was abolished.

John M. Scott, therefore, has only such interest in the property of his deceased wife, Mary Scott, as he is entitled to under the law. This is fixed by Gen. Code 8606 (R. S. 4188), to-wit:

"A widower * * * shall be endowed of an estate for

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life in one-third of all the real property of which the deceased consort was seized as an estate of inheritance at any time during the marriage, in one-third of all the real property of which the deceased consort, at decease, held the fee simple in reversion or remainder, and in one-third of all the title or interest that the deceased consort had, at decease, in any real property held by article, bond, or other evidence of claim.”

The defendant contends, however, that this matter was also determined in the case of *Stephenson v. Norton*, 13 Dec. 150. An examination of this case, however, discloses the fact that it was a mere dictum, as there was no surviving second husband; besides, for the reasons above given in determining the case of *Spitler v. Heeter*, *supra*, it would not control the facts in this case.

The demurrer will be overruled.

WILLS.

[Greene Common Pleas, December, 1911.]

*FRANK E. SHANNON V. CHARLES SHANNON ET AL.

Devise of Property to Wife for Life with Power to Sell and Consume Grants Only Life Estate.

Under devise, providing “I give and bequeath to my wife * * * all my estate both real and personal to be used and disposed of by her according to her best judgment, and at her death to be divided equally between our five children,” the wife did not take a title in fee simple, but a life estate only, with the right to dispose of and convey for her support or consumption; and the rights of the remaindermen are not affected by a conveyance of the property in trust.

KYLE, J.

The plaintiff in this case brings his action for partition of parts of lots 161 and 162 in the city of Xenia, and avers that he is entitled to the undivided one-fifth part of the same. He claims his title as one of the heirs at law of William Q. Shannon. All the other heirs at law of said William Q. Shannon are made parties defendant.

*Affirmed, no op., *Shannon v. Shannon*, 85 Ohio St. 456.

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Charles W. and John R. Shannon file their answer and set forth Item 2 of the will of William Q. Shannon. They further aver that Rebecca A. Shannon, surviving widow of William Q. Shannon, on August 31, 1906, made her conveyance of said premises described in the petition to the two said answering defendants for one dollar and other good and valuable considerations; that on the same day the said answering defendants, contemporaneously with and in connection with the execution of and delivery of said deed of conveyance to them, executed and delivered a declaration of trust reciting that said conveyance to them was subject to the exclusive use and control of Rebecca A. Shannon during her natural life, and further that they held said premises for the benefit of themselves and of the said Charles W. Shannon, Ella B. Mitchell and Frank E. Shannon, and that they would make a sale of said property at such time and upon such terms and in such manner as to them may seem best for said beneficiaries, their heirs and assigns, and aver that they have been in possession and control of said premises since the death of Rebecca A. Shannon, and they claim that by reason of the terms of the will of said William Q. Shannon and the said conveyance and declaration of trust that the said plaintiff is not entitled to partition.

Item 2 of the will of William Q. Shannon is as follows:

"I give and bequeath to my wife Rebecca A. Shannon, all my estate both real and personal to be used and disposed of by her according to her best judgment, and at her death to be divided equally between our five children, viz.: Charles W. Shannon, John R. Shannon, Mrs. Ella Mitchell, Edward L. Shannon, and Frank E. Shannon, and if any of these children should die before the death of their mother, their share of the estate shall go to their lineal heirs equally, and if no heirs, their share of the estate shall be divided equally between their brothers and sister, and if any of the children are in debt to the estate, that indebtedness shall be deducted from their portion."

The plaintiff filed his demurrer to the answer of the de-

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defendants, and the right of the plaintiff to partition is to be determined upon the admitted allegations of the answer.

Whether or not the plaintiff is entitled to partition as against the allegations of the answer depends upon the construction and effect given to item 2 of the will of William Q. Shannon, and the effect of the conveyance made by Rebecca A. Shannon.

Several questions are presented for consideration and might be considered in the following order:

First. What estate or interest did Rebecca A. Shannon take in the real estate in question under item 2 of the will?

It is contended by the plaintiff that she took a life estate only. It is contended by the defendants that she took a fee simple.

Second. If Rebecca A. Shannon only took a life estate what effect is to be given to the conveyance made by her under the powers given her under said will?

It is contended by the plaintiff that the conveyance and declaration of trust are void and have no effect. It is claimed by the defendants that in making said conveyance if Rebecca A. Shannon only took a life estate it came within the powers conferred upon her and is binding upon the property, and that the same is a bar to an action for partition on the part of the plaintiff.

The three leading cases that lay down the doctrines that may be said should govern in this case are to be found in *Baxter v. Bowyer*, 19 Ohio St. 490; *Johnson v. Johnson*, 51 Ohio St. 446 [38 N. E. Rep. 61], and *Bodmann German Prot. Widows' Home v. Lippardt*, 70 Ohio St. 261 [71 N. E. Rep. 770].

According to the views that may be taken of these respective cases hangs the issue of the case under consideration. There is just enough difference between the wills in the cases above referred to and the one under consideration to make the solution somewhat difficult.

In *Bodman German Prot. Widows' Home v. Lippardt*, *supra*, by the terms of the will the wife was given an estate in fee simple "with power to sell or dispose of as she may see

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fit" and providing further that after the death of the wife what should remain would be distributed in a certain manner. The court held that when an estate is devised with the absolute power of disposal a devise over of what may remain is void, and that, therefore the wife took an absolute title, and the words conferring power to sell or dispose of as she may see fit were words of supererogation and added nothing to the title or interest given to the wife.

The language used in the will under consideration is more like the terms used in the will in the case of *Baxter v. Bowyer*, *supra*, in which case the court held that the wife only took a life estate.

In the construction of a will it is the object to determine and give effect to the intention of the testator. In the will in the item under consideration there are no words of perpetuity used. The will gives Rebecca A. Shannon "all my estate both real and personal to be used and disposed of by her according to her best judgment, and at her death to be equally divided between our five children."

To give effect to all the language used in the will it is apparent that the testator intended that at the death of Rebecca A. Shannon the property was to be equally divided among their five children. Since the bequest to Rebecca A. Shannon included both real and personal, the phrase, "to be used and disposed of by her according to her best judgment" should be construed in the light of that fact.

If Rebecca A. Shannon took a fee her power and right to vest the title in two of the children as trustees, with power to sell at such time as they might see fit, would be unquestioned, and the conveyance in question would defeat plaintiff in his right for partition.

If Rebecca A. Shannon took only a life estate, then her right and the effect of the deed made by her must depend upon the construction of the powers given her in the will.

Every will must be construed upon its face to give effect, if possible, to the intention of the testator. In the light of the authorities I am of the opinion that Rebecca A. Shannon took

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only a life estate in the property, and did not take a title in fee simple, and that the rule laid down in the case of *Baxter v. Baxter* applies in this case.

The next question for consideration: If she took a life estate only, was the conveyance made by her, as set forth in the answer, within her powers given under the will?

If by the terms of the will she had a right to make a conveyance for her own needs or consumption and support only, the conveyance in question not having that effect would be beyond her power and would be of no validity in law. If the broader view is taken and it is held to mean that she could do anything with respect to the property as she might see fit, and having seen fit to make the deed in question it might bind all the parties hereto and defeat the right of partition.

If, instead of making a deed, Rebecca A. Shannon had seen fit by will to dispose of this property, the question would then be presented as to the rights of the legatees under such will as against the heirs of William Q. Shannon—in the broad sense, a bequest by will would have been a disposition of the property as she might deem best, and if such will were held to be good it would defeat the remainderman under the will of William Q. Shannon. Instead of relying upon a will Rebecca A. Shannon made such a conveyance into the hands of these trustees, which was in effect a disposition of the property after the termination of her life estate, and if binding in law would operate to the defeat of the plaintiff in his immediate right to the property.

Since Rebecca A. Shannon took under the will it does not seem to me that she should in an indirect way be permitted to defeat or affect the right of the remaindermen in the will under which she took title. If the circuit court were correct in the *Kelble* case in deducing the right of consumption in the widow by implication under the will which clearly gave her only a life estate by reason of the subsequent bequest of the *unconsumed* residue, the court in this case could read into the will of William Q. Shannon by implication that Rebecca A. Shannon only took a life estate with the power of consumption and could not defeat the rights of the remaindermen; and,

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therefore, my conclusion is that Rebecca A. Shannon took only a life estate with the right to convey or dispose of for her support or consumption, and that the conveyance set forth in the answer in trust, as set forth in the declaration, was not contemplated within the meaning of the terms of the bequest to her, and is an attempt to defeat the right of the remaindermen and destroy a vested right.

The conveyance and declaration of trust will be held to be of no effect in law, and therefore, the plaintiff is entitled to his right of immediate possession and is entitled to a writ of partition as prayed for in the petition, and the demurrer to the answer will be sustained.

CRIMINAL LAW—LIMITATION OF ACTIONS.

[Licking Common Pleas, April Term, 1912.]

STATE OF OHIO v. FLOYD NORRIS.

Preliminary Hearing Within Three Years Prevents Filing of Limitation as to Prosecutions for Misdemeanor.

The bar of Gen. Code 12381, limiting the prosecution of misdemeanors to three years from the date of the offense, is prevented from falling where a preliminary hearing has been had within the three year period, and a motion to quash an indictment will not lie on the ground that it was not returned until more than three years after the commission of the offense alleged.

Phil. B. Smythe, Prosecuting Attorney, for plaintiff.

B. G. Smythe, for defendant.

SEWARD, J. (Orally.)

A question was raised in this case under Gen. Code 12381, that the prosecution of the defendant was barred by the statute of limitations—under the three-year provision of the statute. To my very great surprise I found this provision in the statute was enacted in about 1845, and it is now substantially as it was then, and it has never been construed or gone before any court at any time as far as I am able to determine. It was

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amended, but substantially the same provision has been in the statute for a great number of years. It reads as follows:

“A person shall not be indicted or criminally prosecuted for a misdemeanor, the prosecution of which is not specially limited by law, unless such indictment is found, or prosecution commenced, within three years from the time such misdemeanor was committed.”

This indictment was not found within three years from the time the offense was committed, but the defendant was arrested and taken before some officer—either a justice of the peace or the mayor—and was bound over to this court before the expiration of the three years. The question is whether that is a prosecution which saves it from being barred by the statute of limitations.

Suppose that the prosecuting witness had not learned who the person was who committed the offense until just shortly before the three years had expired; that he knew that there was an offense committed, but did not know who committed it; and just before the three years had expired, he should ascertain who committed it and had arrested him under an affidavit filed before the mayor or the justice of the peace, and he was taken before that officer and had a trial, or hearing, and was bound over to the common pleas court; the common pleas court or the grand jury did not meet until after the three-year term had expired, would that be barred by this section of the statute?

The court thinks that the preliminary hearing is a prosecution that would save it from being barred by the statute of limitations. A motion to quash may be considered as filed, and it will be overruled with exceptions.

Cuyahoga Common Pleas.

BUILDINGS—CONTRACTS—CORPORATIONS.

[Cuyahoga Common Pleas, May 28, 1913.]

CLEVELAND BUILDERS SUPPLY CO. v. CITY INVESTMENT CO.

1. **Guaranty of Financial Responsibility of Unknown Contractor to Material Company Makes Building Company Liable upon Default of Contractor.**

A building company, prior to the erection of a building, asking for estimates on material to be sold to and charged against a contractor when engaged and accepting a proposition as to prices and material, providing that the material is "to be charged and billed to the contractor * * * you guaranteeing the financial responsibility" of the contractor, guarantees the financial responsibility of an unknown and unemployed contractor and the collectibility of the bills furnished under the offer upon the insolvency of the contractor employed.

2. **Building Company Power to Guaranty Financial Responsibility of Contractor to Material Company.**

A corporation organized to construct a building may, as part of its implied or incidental powers, guarantee payment of bills for material supplied to a contractor for whom it previously had secured and accepted from a material company estimates for the material to be furnished.

3. **Secretary of Building Company Having Power to Guarantee the Financial Responsibility of Building Contractor to Material Company.**

A guaranty of the financial responsibility of a contractor, made by the secretary of a building corporation to a material company upon acceptance of prices, requested before the contractor was known or chosen while not within the usual duties of such officer, yet the company will not be permitted to deny its binding effect where the secretary, who is a son of the general manager, absent on account of ill health, a brother of the treasurer and a member of the board of directors, has acted with his brother as general managers, made and signed all contracts and had entire charge of the construction of the building for which the company was chartered, in all of which his acts have received the assent of the board of directors and approval of its president.

[Syllabus approved by the court.]

Griswold & White, for plaintiff.

Carpenter, Young & Stocker, Stearns, Chamberlain & Royan and W. H. Boyd, for defendant.

BABCOCK, J.

The City Investment Company, before advertising for bids for the construction of their building known as the Sweetland,

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solicited offers, by supply men, of such material as they wished to have used in the construction of their building. They solicited of the plaintiff prices for Darlington brick, in large quantities, but to be sold and charged to the contractor when one was engaged. The Cleveland Builders Supply Company made a written proposition, as requested, for the supply of brick; but since they were to sell to an unknown and unengaged contractor to whom the bills for the brick were to be charged, they naturally wanted some security for such sales. Their offer is as follows:

“Cleveland, Ohio, July 8, 1910.

The City Investment Company,
Cleveland, Ohio.

Gentlemen:

We hereby propose to furnish for the building of your company on Euclid Avenue, this city, 75,000 more or less light gray Darlington brick of a quality and color same as samples submitted to you and marked “A Grade” (identified by our name and your name written in ink thereon) at a price of seventeen dollars and fifty cents (\$17.50) per thousand delivered at the building.

We also propose to furnish 150,000 more or less, light gray Darlington brick of a quality and color same as samples submitted to you and marked “B Grade” (identified by our name and your name written in ink thereon), at a price of sixteen dollars (\$16.00) per thousand delivered at the building.

First shipment of the brick to be delivered within two weeks from time notice is given us to ship, and balance of brick to be delivered as fast as needed for the work and so as not to in any way delay same.

The above brick to be charged and billed to the contractor for the mason work on said building, you guaranteeing the financial responsibility of said mason contractor.

Very truly yours,

The Cleveland Builders Supply Co.

By Bert J. Graham, Mgr. Brick Dept.

Accepted: The City Investment Co., by R. H. Swetland, Sec’y.”

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The controversy is as to the meaning of the concluding clause, "you guaranteeing the financial responsibility of said mason contractor." What does this guarantee import?

The plaintiff says defendant guaranteed the collectibility of the bills for brick furnished under this offer. The defendant says it only guaranteed that the contractor should be a financially responsible person or company, when furnished to the plaintiff to avail himself or themselves of the offer.

The contract was let to the Forest City Construction Company, which was a newly organized corporation, with \$10,000 or \$15,000 capital stock, of which about half had been subscribed. Of this, a controlling number of shares was issued to John Schmeller, who had been theretofore in the mason contracting business, and who furnished the tools of his trade for the stock issued to him. He contributed nothing further to the corporation. The secretary of the company turned over, in payment for his stock, a piece of real estate worth about \$5,000, on which was a \$3,500 mortgage. A few others bought stock, and paid in cash for the same \$1,500. This was all of its assets when the company began business shortly before taking this contract.

During the early part of the year 1910 it made three or four contracts for the building of buildings in the city of Cleveland, which contracts were of such magnitude that any one of them involved a responsibility several times larger than the assets of the company. Presumably, there was a prospective profit on each of these contracts if things came out right in the end. One of the contracts was for the construction of the Henke Building on Lorain Avenue, which building collapsed on November 22 of that year, and prostrated the Forest City Construction Company in its fall. This company had, in the early part of the year, taken the contract to build the Henke building, a concrete construction involving perhaps not less than \$100,000. The building collapsed, either by reason of some fatal weakness in its plan of construction, or for failure on the part of the construction company to use proper material or proper workmanship. The company was doubtless insolvent, without knowing it, months before the collapse occurred, since

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its obligation to properly construct the building made it liable to the owners for all that it had cost them, and much more, to clear away the debris, although apparently its claim against the owners of the building was a valuable asset; but I do not place my opinion in this case on the question of the solvency of the contractor at the time of entering into this contract with the plaintiff for the brick furnished by the plaintiff, for which it filed an attested account.

The guarantee was in this case financial responsibility. Responsibility is the ability to respond; in a word, the ability to pay for the brick as the bills for the same matured in the course of the business. As is said in *Sturgis v. Bank*, 11 Ohio St. 168 *et seq.*, "A guarantee, in its strict legal and commercial sense, is said to be 'an undertaking by one person to be answerable for the payment of some debt or the due performance of some contract or duty by another person, who himself remains liable to pay or perform the same. Originally, the words warranty and guaranty were the same. * * * They are now sometimes used indiscriminately; but in general, warranty is applied to a contract as to the title, quality or quantity of a thing sold; and guaranty is held to be the contract by which one person is bound to another for the fulfillment of a promise or engagement of a third party.' Each is, alike, an undertaking by one party to another to indemnify or make good the party assured against some possible default or defect, in the contemplation of the parties. A guaranty is, perhaps, always understood in its strict legal and commercial sense, as a collateral warranty, and often as a conditional one, against some default or event in the future. The term warranty, on the other hand, is generally understood as an absolute undertaking *in presenti*, as well as *in futuro*, against the defect, or for the quantity or quality contemplated by the parties in the subject-matter of the contract."

Was this a warranty of the financial quality of the contractor who was to be given the privilege of accepting this offer for the brick? Or was it a guaranty of the due performance of the contract about to be entered upon by the contractor?

The court is cited to many cases where the rules of in-

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terpretation are given. These are to be resorted to as aids in determining the meaning of the contract when its meaning is doubtful.

Defendant calls attention to the case of *Switzer v. Baker*, 95 Cal. 539 [30 Pac. Rep. 761], where the court announces the rule that "an agreement to pay the debt of another cannot be inferred from doubtful language which, although it might be capable of being construed as a guaranty, does not exclude an inference, equally reasonable, that it was only intended to express confidence in the financial ability and integrity of the debtor." And in the case of *Kenneweg Co. v. Finney*, 98 Md. 114 [56 Atl. Rep. 482], in which a third party, in a letter urging a broker to close with a seller of garden produce, used the following language: "We are very much interested in seeing that you get the goods, and from the position we occupy, we would say that the contract is good, and that we will look after the same, both to your interest and for our own."

In neither case was the language used held to constitute a legal obligation. In the latter case the court says:

"If the plaintiff required or accepted a guaranty, it was certainly very easily satisfied if it accepted, as it did without comment or objection, language which amounts to nothing more than the mere expression of opinion."

The question in those cases was, whether there was any guaranty. The question here is one as to the extent of a guaranty which was clearly made. The construction company paid for the brick as long and as far as it could; and when it could no longer pay its bills which matured on thirty days' credit, according to the custom of trade, the guarantor became liable on its guaranty for the default of the principal debtor. The builders supply company was asked to agree to sell at a given price to an unknown and as yet unemployed contractor, the choice of whom lay with the investment company. The plaintiff, in making the offer, would naturally require of the one choosing the contractor some guaranty of his solvency, or promise to stand behind him in making the purchase. The parties might have selected plainer words to express their meaning, but the intention of the parties must control. The investment

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company, in effect, said, "We will guarantee his financial responsibility when we choose from among the bidders, but you are pledged to furnish the brick at the price stated in your offer, for it is with reference to it that the bids will be made." If, after the construction company had bound itself to the defendant, the plaintiff had sought to advance the price, or for any reason had declined to furnish the brick, claiming the contracting company was not satisfactory to them financially, the investment company would have said, with unanswerable force, "We stand behind them with the guaranty which we made you in accepting your offer to furnish the brick." To say the guaranty was at an end before the time arrived for the mason contractor to respond to the demand for payment, is to make it a warranty of the contractor's qualifications, rather than a guaranty of future performance, which is the usual office of a guaranty, and particularly fitting this situation.

What is the meaning of responsibility? Webster defines it as "the state of being accountable or answerable as for a debt or obligation. It is the ability to answer in payment." The parties must have anticipated the test of the thing guaranteed as arising when the time came to pay for brick furnished under the contract as provided for. Any other holding would be so technical as to defeat the manifest intention of the parties.

Was this guaranty within the implied or incidental power of the corporation?

Machen, Mod. Law Corp. Sec. 91:

"The power to guarantee performance of contracts by customers of the company may often be found convenient in practice to exercise. It is not a power easily implied, and yet to insert, as one of the company's objects, acting as surety for other persons, would be very hazardous, and might, moreover, subject the corporation to burdensome regulations applicable to surety companies. Moreover, in some cases the power is implied as incidental. We have seen above that any corporation owning a bill of exchange or promissory note or coupon bond, and desiring to assign the same, may, by endorsement or otherwise, guarantee payment. So it has been held that a company engaged in manufacturing and selling lumber may become surety

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on the bond of a contractor, to whom it furnishes building material, who is required to give bond to secure performance of a contract. Similarly, a brewing company may go surety for a publican on a bond necessary to secure him a license to sell surety's liquors. It has often been held that a manufacturing company may lend its credit to a debtor who is in embarrassed circumstances,—a decision which certainly goes to the extreme limit of the law. It has also been held that a company, when purchasing property, has implied power, as part of the consideration, to endorse or guarantee notes of the vendor. But this decision overlooks the fact that the objection to guarantees by corporations does not lie merely in the fact that the company receives no benefit, but also in the fact that a corporation has no implied power to speculate upon the ability or inability of a third person to meet his obligations. It has been held that a company which has power to purchase shares in another corporation may, as part of the consideration for the purchase, agree to guarantee dividends on other stock of the second corporation—a decision which is likewise rather questionable. Of course, where the corporation is in fact the principal debtor, there is no legal objection to the execution of commercial paper whereby the company appears in form as a conditional endorser."

Humbolt Min. Co. v. Manufacturing Co. 62 Fed. Rep. 360 [10 C. C. A. 415], is authority for denying the power to a selling corporation to guarantee the buyer's contracts involving the use of the material sold.

Wheeler v. Land Co. 14 Wash. 639 [45 Pac. Rep. 316], is to the contrary, it appearing in that case that it was customary for such corporations to enter into such contracts in order to get business.

To the same effect is *Central Lumber Co. v. Kelter*, 201 Ill. 503 [66 N. E. Rep. 543].

In *Mercantile Trust Co. v. Kiser*, 91 Ga. 636 [18 S. E. Rep. 358], it was held, that where it is essential to the successful prosecution of its business, by a large sawmill corporation, that a short line of railway, penetrating the country from which its supply of timber must be drawn, should be constructed and operated, and this enterprise is undertaken by a railway

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corporation, which issues bonds for the purpose of raising funds with which to construct the railway, the interest on these bonds may, before they are negotiated, be guaranteed by the sawmill corporation.

Holmes v. Willard, 125 N. Y. 75 [25 N. E. Rep. 1083; 11 L. R. A. 170], upholds the doctrine that a manufacturing corporation, needing goods for its business, may, as a proper incident to its business, extend financial aid to a manufacturer by advancing him money to enable him to furnish the goods; and that this aid may be extended by a loan of its own money, or it may take his notes, and, by its credit, raise money thereon, and advance such money, looking for reimbursement out of the goods to be manufactured and delivered to it.

In *Low v. Railway*, 52 Cal. 53, 59 [28 Am. Rep. 629], the court said:

"Had a natural person taken this lease and made the contract of guaranty now before us, there is no room to doubt but it would be held valid; and this being so, the exercise of the power by the corporation must be upheld, unless, by its very nature, it is a power which a corporation cannot exercise. There is no sufficient reason deducible from the character of such corporation and the business in which it engages, why the corporation cannot, for a valid consideration, guarantee the payment of a debt which it may directly contract to pay, why the corporation may not, upon a sufficient consideration, make a conditional as well as an absolute promise of payment."

In *People v. Chicago Gas etc. Co.* 130 Ill. 268 [22 N. E. Rep. 798; 8 L. R. A. 497; 17 Am. St. Rep. 319], an incidental power of a corporation is said to be "one that is directly and immediately proper to the execution of the specific power granted, and not one that has a slight or remote relation to it."

This is a succinct statement of the rule, and, when applied to the present situation, I am of opinion the power attempted to be exercised by this defendant was proper to the execution of the specific power granted by its charter, which was the construction of the building to which this material was to be appropriated.

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From the above citations it is plain that many of the cases would deny the power of the plaintiff in this case to have guaranteed the construction company's contract as an inducement to the purchase of their goods. It is another question whether the investment company might not guarantee the payment of the material man's goods which were to go into its building, when it could, without question, have directly purchased them and employed them in the construction of its building by the contractor. In providing for the offer which was to be available to a contractor when secured, the defendant was serving its own ends. It desired certain materials for its building. It naturally wished for low bids; and, to insure contractors' prices which would be stable, it got from the plaintiff the offer for the benefit of the contractor, and with reference to which he was invited to make his bid. It served its own ends, and, in doing so, it was carrying out the very purpose of its creation. If it could have purchased the brick and had the walls built by days' work, why not by contract? And if it could purchase the brick, why, with the funds in its hands to secure itself against the risk of its guaranty, might it not do indirectly that which it could do directly?

I think there can be no doubt but what this guaranty was within the power of the corporation.

It is urged that the secretary could not bind the corporation by the guaranty.

It is not within the usual duties of the secretary of a corporation to make contracts in its behalf; and, in order to establish such authority, express or implied, some affirmative evidence is necessary.

It appears in proof that the secretary was one of the members of the board of directors, and T. M. Swetland, father of the secretary, was the general manager. He was an elderly man, and was absent from the country in search of health most of the time the building was being constructed. Fred L. Swetland, brother of the secretary, was vice president and treasurer. The secretary and treasurer, both members of the board of directors, had entire charge of the business of erecting the building. The minutes of the corporation are silent as to the manner

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of conducting the business. The secretary, with the consent of the board of directors, made and signed for the corporation nearly all of the building contracts, amounting substantially to a quarter of a million dollars. The secretary, with his brother, superintended the entire work of construction, and performed the duties of the general manager, with his acquiescence and with the full assent of the board of directors, except the signing of checks for the payment of bills, which was done by the president of the corporation, who gave no further attention to it than to sign checks made out and brought to him for his signature by the two Swetlands acting in the place of the general manager.

To deny the authority of the secretary to make the guaranty in question, would enable a corporation to impose on the business public, availing itself of those engagements made by him which were for its benefit, and avoiding those which entailed loss upon it. The general manager or managing officer of the corporation has power, *prima facie*, to do any act which the directors could authorize or ratify, and to perform generally anything in the ordinary course of the business. His duties were performed by the secretary of the corporation, by the express authority of the board of directors, and it seems to have ratified, in every instance, everything that he did on its behalf.

It therefore follows that the defendant is indebted to the plaintiff on its guaranty, for the unpaid bills of the construction company to this plaintiff for brick furnished it, in the sum of \$5,428.50.

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BAIL AND RECOGNIZANCE.

[Hamilton Common Pleas, July 24, 1912.]

STATE EX REL. PHILIP NATHAN V. CHARLES S. WEYAND, CLERK.

Mandamus Lies to Compel Acceptance of Bail in Criminal Prosecution Regardless of Character of Bondsman.

An officer, authorized to accept bail in a criminal prosecution determines the sufficiency of the bond in form and amount without regard to the character of the proposed surety; hence, mandamus lies to compel a police court clerk to accept bail, notwithstanding the surety is a professional bondsman for hire.

Charles S. Sparks, for relator.

John W. Weinig, Asst. City Solicitor, and *Bernard C. Fox*, Prosecuting Attorney, for respondent.

DICKSON, J.

The plaintiff, relator, complains that the defendant, a police court clerk, has refused to permit him to be a surety on a bond in said court.

At the hearing it was admitted that the financial responsibility of the plaintiff was ample. The only reason given for the refusal was that the plaintiff was a professional bondsman, *i. e.*, one who was willing and did sign the bonds of accused persons for hire.

Whenever the right to bail exists, the duty to accept is inviolable. The right exists when and because,

"All persons shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great." (Bill of Rights, Article I, Section 9.)

The presumption of innocence and the right to bail go hand in hand and are twins—and sacred.

The duty in the officer with authority to accept bail begins and ends with the efficiency of the bond in form, and its sufficiency is pecuniary value. He is not allowed to exercise any discretion as to the reputation, character, morals, standing, politics, religion or color of the signer. He must exercise this duty promptly and without prejudice or favor and im-

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partially—and without fear or influence. When such an officer has acted thus, then only has he done his duty. Any alleged evil arising from accepting the professional bondsman does not concern him. No one signs another's bond without consideration. The consideration is always some form of friendship or money. The stranger within the gate must hire the bondsman. The hired bondsman may be even more worthy than the volunteer—undoubtedly his risk is usually the greater.

The writ will be granted.

JURY—STATUTES.

[Sandusky Common Pleas, July 5, 1913.]

FRANK S. SHOFFSTAHL v. ROBERT A. ELDER ET AL.

1. Three-Fourths Jury Provision Applies to Civil Action, the Cause and Trial of which Arose and was Begun Before, but Trials not Completed until After, Act Become Effective.

The right of trial by jury prescribed by Art. 1, Sec. 5, Const. (1851) was a vested right to trial by a common law jury the number of which could not be changed by legislative act but was subject to the provision of Art. 16 thereof, relating to amendment of the constitution. Hence, Art. 1, Sec. 5, September 3, 1913, having been amended to authorize the passage of laws for verdicts in civil cases by not less than the concurrence of three-fourths of a jury, Gen. Code 11455, amended February 13, 1913, and taking effect at May 13, 1913, authorizing a verdict by concurrence of ten members, applies to a cause of action arising August 24, 1912, for which a petition was filed March 21, 1913, and upon which trial was begun May 6, 1913, and instruction for such verdict given May 20, 1913.

2. Three-Fourths Jury Provision Applies to all Actions Begun After January 1, 1913.

Act of February 13, 1913, becoming effective May 13, 1913, amending Gen. Code 11455 to authorize a verdict by concurrence of nine or more jurors, merely changes the form of the verdict and manner of presenting it into court and is not within the exception of Gen. Code 26 as to pending actions and remedies or procedure; hence, it is not limited to actions not pending May 14, 1913, but applies to all actions filed after January 1, 1913.

Jesse Vickery, for plaintiff.

Parkhurst & Vickery and *Garver & Garver*, for defendants.

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STAHL, J.

In this case, the cause of action set forth in the plaintiff's petition arose on August 24, 1912. The petition in the case was filed on March 21, 1913. The trial of the case was commenced on May 6, 1913. It was completed,—the argument of counsel was had and the jury was charged by the court and the case submitted to the jury on May 20, 1913. The court instructed the jury that a verdict could be rendered upon the concurrence of nine or more of their number. This was done in accordance with the provisions of Gen. Code 11455, as amended. This amended section was filed with the secretary of state on February 13, 1913, and therefore took effect and became in force on May 14, 1913. In accordance with the instructions of the court, a verdict was rendered by the jury upon a concurrence of ten members thereof, all of whom signed the verdict. The verdict was in favor of the defendant.

The plaintiff now claims that the court erred in so instructing the jury for the reason that the petition was filed before this amendment of the statute took effect, and that therefore the amendment did not apply to the case, but that the old rule requiring the concurrence of all the jurors applied to the case; and upon the argument of a motion for a new trial, this is set forth as the principal ground of error in the case, and it has been argued to the court with great force and ability.

It is claimed in argument that the old rule applied for two reasons; first, because the plaintiff had a vested interest in the right to a trial by a common law jury, which required the concurrence of twelve members, and which could not, by any method, be taken from the plaintiff, for the reason that the cause or right of action existed before the adoption of the amendments to the constitution, which were adopted on September 3, 1912, and which took effect on January 1, 1913; and further, because the petition was filed before the present amendment to the jury law took effect.

That there is no vested interest in a common law remedy is a proposition so well established that the citation of authorities to support it is entirely unnecessary. It has been held,

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in Ohio, that a party has a vested interest in the right to a trial by a common law jury, but these cases were based upon the fact that the constitution of 1851, by Art. 1, Sec. 5, provides that the right of trial by jury shall be inviolate; and it has been held that this means a common law jury consisting of twelve men, and that the verdict requires the concurrence of all the jurors. It is because the constitution so provided that the right to a trial by such a jury was held to be a vested right, and that therefore the legislature could not, by any act, deprive a party of this right. But it must be remembered that Art. 1, Sec. 5, of the constitution was expressly subject to the provisions of Art. 16 of the constitution, which provides that the constitution may be amended in certain ways; and therefore the right to a trial by a common law jury was vested, subject to the right of the people, by amendment to their constitution, to take it away; and when the people, at the election held September 3, 1913, passed this amendment:—"Art. 1, Sec. 5. The right of trial by jury shall be inviolate, except that in civil cases laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury." They thereby did that which they had the power, under the constitution to do; and since that time the right to trial by jury is governed by that section of the constitution as it now stands, and not as it stood before, and therefore the legislature had the power and authority to pass the act which it did pass. For these reasons the first claim of the plaintiff is untenable.

Secondly, it is claimed that by virtue of Gen. Code 26, the act could not apply to cases pending on May 14, 1913, inasmuch as it was not expressly provided in the amendment that it should apply to such cases.

General Code 26 reads as follows: "Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions, or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions, or proceedings, unless so expressed, nor shall any repeal or

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amendment affect causes of such action, prosecution, or proceeding, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amendment or repealing act." It will be observed that Gen. Code 11455, as it stood before the amendment, did not give a party the right of a trial by a common law jury. It was not by virtue or force of that section that the right to a common law jury existed, and that section did not even profess to give that right. That right was granted and existed in favor of a party by virtue of the constitution of 1851. Gen. Code 11455 provided merely for the form of the verdict and the method of designating the concurrence of the jury, and the conduct of the jury in the matter of delivering their verdict into court. The amendment, therefore, did not, with reference to the concurrence of the jurors, alter or change the provisions of the amended section at all. The amendment merely changed the form of the verdict and the manner of presenting the verdict into court by the jury, insofar as it changed the provisions of the amended section.

Although it is true that the provision for a verdict by the concurrence of nine or more of the members is included in this amended section, still it did not change the things provided for by the amended section in any particular whatever. Had the legislature seen fit to do so it might have passed a general law providing for this; it might have created an independent act, thereby creating entirely new legislation, without changing or amending any section then existing in any way or manner whatever. In that event, had the legislature seen fit to do that, then Gen. Code 11455 might have remained in precisely the same form it was before. If that had been done, then when nine or more jurors concurred in a verdict, the foreman would have signed it, and the jury would have presented their verdict in open court the same as they had always done; and the same procedure would have been had with reference to recording the verdict as was done before. In that event, had the legislature so acted, it could not have been said that such act constituted an amendment of an existing

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statute, and that therefore Gen. Code 26 applied. Of course, had the legislature done that, it might have been argued with considerable force that the reasoning in the case of *Cincinnati, H. & D. Ry. v. Hedges*, 63 Ohio St. 339 [58 N. E. Rep. 804], would make Gen. Code 26 applicable to such independent act; but still, even in the light of the reasoning in that case, it could not, it seems to me, be held that in such event Gen. Code 26 could apply, because it could not be held to be a change of any rule of statutory procedure, but merely the exercise of a right, granted to the legislature by the people, by an independent action on its part. And it has been held, in the case of *Wheeling & L. E. Ry. v. Railway*, 72 Ohio St. 368 [74 N. E. Rep. 209; 106 Am. St. Rep. 622; 2 Apr. Cas. 941], that, being entirely new legislation, Gen. Code 26 would not apply.

Now it seems to me that if that reasoning is correct, that it applies with equal force to this amendment, inasmuch as the amendment does not change or alter, in any degree, any right or privilege granted or existing by virtue of the section amended.

But if this reasoning does not exclude the application of Gen. Code 26 to the act as amended, it appears to me that the legislature has clearly indicated its intention that the amended section shall apply to all cases, whenever commenced, or whenever the cause of action arose; and that, under the constitution, it must be held to apply to all actions filed after January 1, 1913.

General Code 11455 constitutes one of a series of sections of the General Code governing the making of the jury, the procedure of the trial before the jury, the form of the verdict by the jury, and the conduct of the jury in presenting their verdict into court. Gen. Code 11455, before its amendment, read as follows: "When jurors agree upon a verdict, it must be reduced to writing and signed by the foreman, and they must then be conducted into court, where their names shall be called by the clerk, and the verdict rendered by the foreman. The clerk then must read the verdict to the jury and make

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inquiry if it is their verdict." As amended, the section reads as follows: "In all civil actions, a jury shall render a verdict upon the concurrence of three-fourths or more of their number. The verdict shall be in writing signed by each of such jurors concurring therein, and they must then be conducted into court, where their names shall be called by the clerk, and the verdict handed to the clerk by the foreman. The clerk must then read the verdict to the jury, and make inquiry if it is the verdict of three-fourths or more of their number." Had the legislature intended that this amended section should be read in connection with Gen. Code 26, and so made applicable only to causes of action arising and cases filed after it went into effect, it would have said: "A jury shall render a verdict upon the concurrence of three-fourths or more of their number." This would have been effective to make it applicable, in connection with Gen. Code 26, only to all suits filed after the date of the act going into effect; it would have been as effective for that purpose as the language used by the legislature. But the legislature did not use this language, it said: "In all civil actions a jury shall render a verdict upon the concurrence of three-fourths of their number." Considering this section as one of a series of sections, as I have stated, and that the legislature had the power to make these provisions by a separate and distinct act, leaving the original act as to the form of the verdict precisely as it was, it clearly indicates an intention on the part of the legislature to make the amended section applicable to all cases filed after January 1, 1913.

I am aware that, in *State v. Rabbitts*, 46 Ohio St. 178 [19 N. E. Rep. 437], the Supreme Court says: "No generality of language used in an amendment relating to the remedy will, under Gen. Code 26, make it applicable to a pending action, prosecution or proceeding. To make it so applicable, the intention must be expressed in a provision to that effect." But no legislature has the power to control the action of any subsequent legislature, and no court can, by any rule of construction, limit the power of the legislature to express its intention in any

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language it may see fit to use; and besides, the Supreme Court, in the case of *Friend v. Levy*, 76 Ohio St. 26 [80 N. E. Rep. 1036], has, in effect, overruled the case of *State v. Rabbitts*, *supra*. In that case (*Friend v. Levy*, *supra*) it held that it was clear, from the provisions of the act, that the legislature did not intend that Gen. Code 26 should apply to the amended statute, although that intention was not expressed in the form of language suggested in *State v. Rabbitts*, *supra*.

It seems to me that it is the duty of the court, in construing this act, to take into consideration the history of the act. There had been, prior to the adoption of the recent amendments to the constitution, and prior to the adoption of this amendment, very great agitation in favor of the three-fourths verdict, because it was claimed and urged that there was great delay in the judicial procedure, and that the adoption of such a rule would greatly expedite the trial of causes, and the disposition of business in court. By the amendment of the constitution it was not provided that a verdict should be rendered upon the concurrence of three-fourths of the jury, but it was expressly provided that the legislature should have the power to make such provision. Evidently, therefore, when the legislature passed this amendment, it did so for the purpose of eliminating the delay, which, it was claimed, existed; and therefore, viewing this act in the light of these conditions, and the arguments which brought it into existence, and taking it in connection with all the surrounding sections which tend to form an harmonious whole, it seems to me that it is clear that the legislature intended it to apply to all actions filed after January 1, 1913, no matter when the cause of action set forth in the petition arose. It will be noted that Gen. Code 26 provides: "Nor shall any amendment or repeal affect causes of such action, prosecution or proceeding existing at the time of such amendment unless otherwise expressly provided in the amending or repealing act." It therefore follows that if Gen. Code 11455, as amended, does not apply, because of Gen. Code 26, to cases begun before May 14, 1913, it does not apply to cases filed after May 14, 1913, which set forth a cause of

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action which accrued before May 14, 1913, because if this section applies in one case, it also applies in the other case. If a declaration of the Supreme Court be necessary to show this fact, it will be found in the case of *Cincinnati, H. & D. Ry. v. Hedges, supra*. In that case, the plaintiff was injured on May 23, 1889. On April 2, 1890, an act of the legislature was passed, providing that proof of certain things should be *prima facie* evidence of negligence. Suit was begun May 21, 1890. The court of common pleas charged the jury in accordance with the provisions of this act, and the Supreme Court held that because of the provisions of Gen. Code 26 this was error.

Now if Gen. Code 26 applies to all cases where the cause of action arose prior to May 14, 1913, then cases may be filed ten or twelve years from now, and still the old jury rule will apply. If a cause of action arose on a promissory note on May 10, 1913, and the owner of that note waits fourteen years and six months, as he may do, before bringing a suit upon it, he will still have the right to have his case tried by a common law jury; and in truth and in fact, most of the litigation that will arise within the next several years will be based upon causes of action that arose before May 14, 1913; and considering the purpose that the legislature had in passing this act, and taking into consideration the language that it has used, it is clear to me that it did not intend that such a situation should exist; and that it has, on the other hand, clearly expressed its intention that it shall apply to all cases which have been filed since January 1, 1913, and to all cases which may hereafter be filed.

The reason, and the only reason, why the amended section can not be held to apply to cases filed before January 1, 1913, is because in amendment No. 41 there is this provision: "Provided that all cases pending in courts on January 1, 1913, shall be heard and tried in the same manner and by the same procedure as now authorized by law."

For these reasons, the contentions of the plaintiff in argument will not be sustained.

A number of other errors are assigned, but it would serve

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no good purpose to discuss them at length. Believing that there was no error of law committed in the trial in this case, the motion of the plaintiff for a new trial will be overruled, and judgment will be entered on the verdict, and the exception of the plaintiff will be noted.

INJUNCTIONS—MUNICIPAL WATERWORKS.

[Hamilton Common Pleas, 1913.]

JOHN C. ROGERS v. CINCINNATI (CITY) ET AL.

1. Municipal Waterworks Management may Require Water Takers by Meter to Pay Service Charge.

Under Gen. Code 3958, the director of public service of a city, owning and operating a waterworks may require consumers of water who have installed meters, to pay a service charge based upon the size of the meter, as part of the water rent necessary for the maintenance of the plant.

2. Meter Users of Water Required to Make Cash Deposit per Quarter.

The regulation of the director of public service may also require of meter users a cash deposit in advance for a quarterly period.

3. Discrimination between Domestic and Commercial Meter Users as to Cash Deposit Invalid.

But regulations that require such cash deposit in advance of domestic consumers only and not of commercial or mercantile consumers are discriminatory, unreasonable, and an abuse of the discretion vested in the director of public service, and therefore invalid.

4. Taxpayer may Bring Action to Test Validity of Waterworks Regulations.

A taxpayer under Gen. Code 4314 (R. S. 1778) upon refusal of the city solicitor to bring an action to test the validity of such regulations, may bring an action in his own name.

[Syllabus by the court.]

DEMURRER to petition.

MAY, J.

This is a taxpayer's suit to enjoin the city of Cincinnati, Victor T. Price, its director of public service and Bert L. Baldwin, general superintendent of the city waterworks from requiring consumers of water by meter measurement to deposit

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in advance an estimated amount to cover quarterly use of water; and also to enjoin them from making a service charge based upon the size of the meter. The petition sets out the necessary request made by the plaintiff of the city solicitor, to bring this action, and the refusal of the solicitor.

The orders which the plaintiff seeks to enjoin are set out in full in the petition. The material parts of the notice or regulation are as follows:

"All water rents of any description for any commercial or mercantile premises under meter, elevator or special rates shall be paid monthly or quarterly as the general superintendent of the waterworks may direct, and shall include the service charge as well as the charge for water rent."

"All bills other than those for commercial or mercantile premises shall be payable quarterly, unless otherwise ordered."

"On all quarterly bills a cash deposit shall be made in advance, based approximately on the average quarterly consumption for the previous year."

For all meter service within the city limits, the charge for water registered by meter will be seven cents per hundred cubic feet. In addition thereto a service charge shall be paid which will vary according to the size of the connected meter as shown in the following table:

Size of Meter	Per Month	Per Quarter.
1-2 inch	\$.17	\$.51
5-8 inch	.25	.75
3-4 inch	.40	1.20
1 inch	.60	1.80
1½ inch	1.00	3.00
2 inch	1.25	3.75
3 inch	1.50	4.50
4 inch	2.00	6.00
6 inch	2.50	7.50

The plaintiff contends that it is beyond the corporate power of the defendants to discriminate in its charges for use of water between its commercial or mercantile and its domestic consumers; that the director of public service, if such discrimination

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may be made, must make the same and cannot delegate his discretion to the superintendent of the waterworks; that it is beyond the powers of the defendant to demand a cash deposit in advance based on the average consumption during the same period of the previous year, because the same is a mere guess and is inaccurate and is unreasonable; and finally, that the service charge based on the size of the meter is an abuse of corporate power; is oppressive, arbitrary and unreasonable in that such charge does not take into consideration the amount of water consumed, "but is based wholly upon what the consumer may use if he sees fit to use it, and is the same whether he uses no water whatever as when he uses the full capacity of the meter."

The defendants filed both a special demurrer and a general demurrer to this petition. By the special demurrer the defendants challenge the right of a taxpayer to maintain this action, claiming that water rents are not taxes and that as the city solicitor represents all users of water he cannot bring an action in behalf of some as against others.

The special demurrer is not well taken.

Under Gen. Code 4311 (R. S. 1777),

"The city solicitor shall apply in the name of the corporation * * * for an order of injunction to restrain the misapplication of funds of the corporation or the abuse of its corporate powers * * *."

The Supreme Court in the *Elyria Gas & Water Co. v. Elyria*, 57 Ohio St. 374 [49 N. E. Rep. 335], held:

"The abuse of corporate powers, within the purview of section 1777 R. S. (now 4311 Gen. Code) includes the unlawful exercise of powers possessed by the corporation, as well as the assumption of power not conferred."

The plaintiff therefore upon the refusal of the solicitor to bring an action to test the validity of the powers in reference to water rates sought to be exercised by the city, has the right to maintain this action under Gen. Code 4314 (R. S. 1778).

By general demurrer the defendants raise the question whether the petition states facts which show a cause of action.

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In Ohio a municipality may own and operate a waterworks; under Gen. Code 3956, the director of public service shall manage and control the waterworks, furnish the supplies of water and collect water rents.

Under Gen. Code 3957:

"Such director may make such by-laws and regulations as he deems necessary for the safe, economical and efficient management and protection of the waterworks. Such by-laws and regulations shall have the same validity as ordinances when not repugnant thereto or to the constitution or laws of the state."

Gen. Code 3958 provides:

"For the purpose of paying the expenses of conducting and managing the waterworks, such director may assess and collect from time to time a water rent of sufficient amount in such manner as he deems most equitable upon all tenements and premises supplied with water."

By virtue of these statutory provisions a wide discretion is vested in the director of public service, both in respect to the manner of assessing and collecting the water rents, and unless his regulations are unreasonable in the sense that they are discriminatory, excessive or confiscatory, they will not be set aside.

Two other facts must also be borne in mind; first, a municipality owning and operating a waterworks, acts in its private or trading capacity rather than in its public or governmental capacity; and second, that the same rule of uniformity in rates does not apply as in the case of taxes.

In the case of *Alter v. Cincinnati*, 56 Ohio St. 47 [46 N. E. Rep. 69; 35 L. R. A. 737], involving the constitutionality of the act under which the present waterworks were built, the court held at page 67:

"Water rents are not, strictly speaking, taxes, and certainly not taxes on property to be regulated under article twelve of the constitution."

Therefore it follows that as the city furnishes water to its consumers, its director of public service in charge of the waterworks may make such by-laws and regulations as he deems necessary for the safe, economical and efficient management, and

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may assess and collect from time to time a rent of sufficient amount, in such manner as he deems most equitable, upon the tenements and premises supplied with water.

The question raised is whether the regulations as contained in the order set out in the petition are reasonable. On the argument it was contended by the plaintiff that when a consumer had installed a meter, there could be but one charge for water, that is, by the volume consumed. This is not the law as laid down by the leading authorities. In addition to the charge for consumption there may be an additional charge, known as a service charge, or minimum charge. This point has been expressly decided by the Public Service Commission of Wisconsin in 3 Wis. Pub. Serv. Com. 305, 313, 318 and 5 Wis. Pub. Serv. Com. 84, 766.

So in *Robbins v. Electric Co.* 100 Me. 496 [62 Atl. Rep. 136; 1 L. R. A. (N. S.) 963], the court held:

"The quantity of water used and cost of individual service are the principal elements for consideration in fixing the charges for a water supply between individual takers or class of takers."

The service charge, as shown by the regulations set out in the petition, is added to the bills of all consumers who use meters. The charge is made in accordance with the size of the meter, and a court cannot say that such a classification is unjust, arbitrary, excessive or unreasonable. It is but another method of making a minimum charge, and minimum charges, where they are made alike on all within a certain class, have been upheld. *Cox v. Furniture Factory*, 75 S. C. 48 [54 S. E. Rep. 830].

But it is contended that this service charge is not uniform, i. e., that while seventeen cents per month is charged for one-half inch meter, the same proportion is not kept up as the size of the meter increases; for example, for a one inch meter sixty cents is charged, for a four inch meter two dollars, and for a six inch meter two dollars and a half. In the absence of allegations, however, that this sliding scale which is uniform as to all meters of a like size, is more than the equitable share of every meter user, taking into consideration the cost of maintaining

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the plant in readiness to serve every consumer, this seeming discrimination cannot be held to be so unreasonable, unjust and arbitrary as to justify a court in holding it invalid.

The plaintiff likewise complains that though meters have been installed a cash deposit in advance is demanded of domestic consumers in an amount equal to the consumption of a like period of the previous year. The plaintiff boldly claims that where consumption is measured by meter, no deposit for security or payment in advance can be demanded, because the amount is necessarily uncertain and mere guess work, and more may be exacted than the consumer is called upon to pay. The argument is based upon the tax theory that water rents are taxes, and that while taxes may be payable in advance, nevertheless they must be for a fixed and certain amount; otherwise more is demanded than is legally due.

As has already been pointed out, there is no analogy between the payment of water rent and taxes, especially as far as the rule of uniformity is concerned. *Alter v. Cincinnati, supra.*

The case of *Mansfield v. Manufacturing Co.* 82 Ohio St. 216, 231 [92 N. E. Rep. 233; 31 L. R. A. (N. S.) 301, 19 Ann. Cas. 842], is likewise cited for the proposition. That case merely holds that the city may charge by meter rates and that if the amount due is not paid, the city may turn off the water; but if the consumer dispute the amount he must offer to pay what he claims is due, and that pending the hearing to ascertain the true amount, the city will be enjoined from turning off the water. At page 231 Judge Summers does say, that prior to meters coming into use, it was customary to demand payment in advance in accordance with a schedule of rates, but that where meters are used the amount cannot be determined in advance. But the court does not hold that a deposit in advance by meter users is illegal.

On the argument it was admitted that nearly sixty per cent of the cost of supplying water in Cincinnati was incurred before the water entered the pipes leading through the meters. A reasonable deposit for security or payment in advance may be demanded by the city waterworks department. 40 Cyc. 804; *Hatch v. Consumers Co.* 17 Idaho 204 [104 Pac. Rep. 670]; *Robbins v. Electric Co., supra*; *Harbison v. Water Co.* 53 S. W.

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Rep. 993 (Tenn.); *Williams v. Gas Co.* 52 Mich. 499 [18 N. W. Rep. 236; 50 Am. Rep. 266].

It is a well known fact, of which this court will take judicial notice, that prior to the introduction of meters, consumers were compelled to pay six months' water rent in advance. In the face of this previous long established custom of six months' advance payment a three months' cash deposit on all quarterly bills in advance cannot be said to be so unreasonable, excessive and arbitrary as to be beyond the powers of the director of public service, "who may assess and collect from time to time a rent of sufficient amount, in such manner as he deems most equitable, on tenements and premises supplied with water."

There remains but one question in this case. Is the director of public service within his powers in permitting commercial or mercantile consumers to pay their meter bills monthly and in requiring all other meter users to pay quarterly and to make a quarterly cash deposit in advance? There can be no doubt that there may be a classification of consumers, *i. e.*, manufacturing, hotels, boarding houses, and residences. 40 Cyc. 802, and cases cited. So, a regulation that commercial or mercantile consumers pay monthly and domestic consumers pay quarterly, is reasonable. But, a regulation which requires domestic consumers to make quarterly deposits in advance, without requiring the commercial or mercantile consumers to make advance deposits, is unreasonable and arbitrary, and is an abuse of the discretion placed in the director of public service. Either all consumers who use meters should be required to make a deposit in advance, or none. There is no reasonable ground for the distinction; therefore, the same is discriminatory and invalid. Otherwise, domestic consumers are paying toward the operating expenses of the waterworks, and the commercial consumers are getting the benefit of service without advance payment or security. For this reason the general demurrer of the defendants must be overruled.

As this discrimination between commercial and domestic consumers is illegal and an abuse of corporate power, it is unnecessary to consider the question whether the director of

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public service had authority to delegate his discretion as to the manner of collecting water rents from commercial or mercantile consumers to the superintendent of waterworks.

APPEARANCE—CRIMINAL LAW—WORK AND LABOR.

[Hamilton Common Pleas, 1913.]

REINHART & NEWTON CO. V. STATE OF OHIO.**1. Ten Hours Proscription against Employment of Females Applies to Candy Factories.**

The proscription of Gen. Code 1008 against the employment of females over eighteen years of age more than ten hours a day or fifty-four hours a week, except in canneries or establishments engaged in the preparation for use of perishable goods, applies to candy factories.

2. Candy not Perishable Goods within Overtime Clause of Female Labor Act.

In candy factories there can be no work performed overtime except to prevent the goods from perishing. The fact that goods could not be prepared in summer so that the factory was compelled to work overtime in the fall to prepare goods for the holiday trade is no defense.

3. Service on Corporations in Criminal Proceedings by Summons.

In a criminal or quasi criminal proceeding the only way service can be obtained upon a corporation is by issuing and serving a summons on one of its officers as provided in cases of indictment, Gen. Code 12607.

4. Motion to Quash for Want of Jurisdiction of Person and Subject Matter is an Appearance.

If the president of the corporation is arrested on a complaint against a corporation for violation of a penal statute, and if the corporation thereafter files a motion to quash on grounds other than that of lack of jurisdiction of the person, this is a voluntary appearance of the corporation and the justice has jurisdiction. A motion to quash because the justice has no jurisdiction of the person of the defendant and of the subject-matter is an appearance, though the defendant states it appears solely for the purpose of the motion.

[Syllabus by the court.]

ERROR to justice of the peace.

Chas. B. Wilby, for plaintiff.

John Deasy, for defendant.

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MAY, J.

This is a proceeding in error to reverse a judgment rendered by the magistrate finding the defendant corporation guilty of violating provisions of Gen. Code 1008, prohibiting every person, partnership or corporation from employing females over eighteen years of age more than ten hours a day.

The defendant seeks a reversal of the judgment on two grounds:

First, that the magistrate had no jurisdiction of the person of the defendant and the subject-matter of the action; and Second, that the defendant being engaged in the preparation for use of perishable goods was within the exception of Gen. Code 1008, which reads:

“Provided, however, that no restrictions as to hours of labor shall apply to canneries or establishments engaged in preparing for use perishable goods.”

The contention that the magistrate did not have jurisdiction of the person of the defendant is based upon the fact that no summons was issued to bring the defendant corporation into court.

From the transcript and original papers in the case, it appears that an affidavit charging a violation of the statute was filed with the justice on October 4, 1912, and on October 10, 1912, the justice issued a warrant to the constable commanding him “to take the said Reinhart and Newton Company, a corporation, by one of its officers, if he be found in your county * * * and him take and safely keep so that you have his body forthwith before me,” etc. The return on the warrant is as follows: “October 11, 1912, I have the body of the within named J. D. Reinhart now in court. Edward Wise, Constable.”

The defendant, appearing for the purpose of its motion only, and not entering its appearance generally, filed a motion to quash the information because of defects apparent upon the face of the record in this, to wit:

1. Because the court lacked jurisdiction of the person of the defendant and of the subject-matter of the action; and,
2. Because of the lack of definiteness and certainty in the election of the offense in that it does not allege in what hours

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more than ten hours on the day named in the information, the said Ida Kennedy worked in the factory of the defendant.

Upon the overruling of the motion, the defendant, appearing solely for the purpose of demurrer, demurred, (1) because the facts do not constitute an offense against the laws of the state of Ohio; and (2) because the court is without jurisdiction of the person and the subject-matter of this action.

This demurrer was likewise overruled.

The plaintiff in error, the defendant below, now contends that the magistrate erred in assuming jurisdiction over the person of the defendant. The state claims that by filing the demurrer, under Gen. Code 13625, the defendant below entered its appearance.

If the defendant below had saved its rights by its motion to quash, it would not have waived any rights by demurring to the petition.

In Ohio there is no statutory authority for the arrest of a corporation. Neither is there any provision for serving a warrant on an officer of a corporation against which a complaint is lodged before a magistrate. When an indictment is returned against a corporation under Gen. Code 13607, a summons commanding the sheriff to notify the accused shall issue, and such summons, with a copy of the indictment, shall be served and returned in the manner provided for service of summons upon such corporation in civil actions.

Although in this case there was no indictment, still, by analogy, if a summons had been issued and served on the president, the service would have been good.

But, in my opinion, the defendant below waived its rights by voluntarily entering its appearance in this case by its motion to quash, which, although stated on its face that the defendant in making the motion appeared solely for the purpose of filing the motion and questioned the jurisdiction of the court, still, the motion went further and by alleging that the court did not have jurisdiction over the subject-matter of the action and also that the affidavit lacked definiteness and certainty in the election of the offense, went into the merits of the case.

Elliott v. Lawhead, 43 Ohio St. 171 [1 N. E. Rep. 577], holds

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that where a motion also asks to have a case dismissed on the ground that the court has no jurisdiction over the subject-matter of the action, which motion is not well founded, it is a voluntary appearance which is equivalent to a service of summons.

The motion in this case was very much like the motion in the case at bar. It contained two points: (1) to strike the case from the docket and the petition from the files for want of legal and proper service; and (2) because said court had no jurisdiction of the subject-matter of said action or debt.

In *Blinn v. Rickett*, 27 O. C. C. 414 (6 N. S. 513), it is held:

"Whenever the defendant asks the court to pass upon any question connected with the merits of the case, that moment he submits himself to the jurisdiction of the court."

In *Smith v. Hoover*, 39 Ohio St. 249, Judge McIlvaine, in laying down the proposition that a defendant has the right to appear by motion for the purpose of raising the question of jurisdiction and that such motion is not an appearance in the case, says at page 257:

"In respect to this question, an important distinction is made between an objection to the jurisdiction of the subject-matter of the suit, and of the person of defendant, although complete jurisdiction in the court to hear and determine the action is not acquired unless the court has jurisdiction over both the subject-matter and the person. An objection to jurisdiction over the subject-matter is a waiver of objection to the jurisdiction of the person, while an objection to the jurisdiction of the person is a waiver of nothing."

See also *Long v. Newhouse*, 57 Ohio St. 348 [49 N. E. Rep. 79].

Under the authorities, therefore, the defendant below, by filing its motion, although it stated on its face that it was filed merely for the purpose of the motion alone, raising questions other than those of jurisdiction, waived its rights and entered its appearance.

The second ground upon which the defendant seeks a reversal of the judgment is not well taken.

The defendant contends that it is within the exception of the statute, "provided, however, that no restrictions as to hours

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of labor shall apply to canneries or establishments engaged in preparing for use perishable goods."

The record shows the defendant is engaged in the manufacturing of candies. Candies, of course, are perishable goods. But the testimony further shows that at the time of the violation of the statute, to wit: September 23, 1912, the defendants' employees were working overtime not to prepare for use perishable goods which otherwise would have been destroyed but to prepare goods for the Thanksgiving and Christmas trade.

The defendant's claim is that because it could not manufacture candies during the summer months for the fall trade, such goods being perishable if made in summer, therefore it could employ female labor overtime in the fall because the purpose of the exception was to favor establishments that have a short season.

This construction is untenable. The language of the statute is clear and applies only to such establishments engaged in preparing for use perishable goods. As the goods in this case, *i. e.*, candies, were not perishable at the time of their preparation, and this is the indisputable evidence, the defendant at the time of the offense charged was not engaged in preparing for use perishable goods, and therefore is not within the exception of the statute.

If the legislature intended to permit establishments, which, because of the necessities of the case, have only a short season, to work overtime, it should have so worded the law. The defendant's appeal is to the legislature, not the courts. Courts must construe a statute as it is written, not as a legislative committee presumed to write it.

Counsel for the defendant likewise contends that inasmuch as there are no other establishments in the state, except candy factories, to which the phrase "engaged in the preparation for use of perishable goods" can apply, that it was the intention of the legislature and that therefore the defendant is within the exception.

This construction is forced. The court cannot say that the language used is a circumlocution for "candy factories." Had the legislature intended this, it should have used words whose meaning is free from doubt.

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There can be no doubt that if the defendant had been employing female labor overtime to prepare goods which otherwise would have perished there would have been no violation of the law. But, as already stated, the evidence conclusively shows that the goods were made in September for the fall holiday trade because they could not be made in summer. But the charge is for working overtime in the fall, not in the summer.

There being no error in the record, the judgment is affirmed.

NEGLIGENCE—PLEADING.

[Hamilton Common Pleas, January 22, 1912.]

AUGUST HOPMAN v. INTERURBAN RY. & TERM. CO.

**Pleading Willfulness and Negligence in Commission of Wrongful Act
Subject to Motion to Elect.**

Plaintiff alleging willfulness and negligence in commission of wrongful act complained of may be required to elect upon which he will rely, not because willfulness is always incompatible with negligence, but because the petition should contain allegations which unconditionally, and not alternatively, preclude plaintiff's own negligence as a directly contributing cause of the injury.

MOTION to elect.

Frank Dinsmore and Chas. M. Leslie, for plaintiff.

Thos. L. Michie and Prescott Smith, for defendant.

HUNT, J.

Plaintiff alleges that the defendant willfully and negligently caused the act complained of in the petition. The defendant has filed a motion to require the plaintiff to elect.

The fact that the wrongful act of the defendant may have been willful, precludes the defense of contributory negligence, not because the acts of the defendant might not be regarded as negligence, but because the negligence of the plaintiff is thereby precluded as a directly contributing cause of the injury.

The doctrine of "last chance," applying the rule that the defendant can be presumed to intend the natural consequences

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of his act under known circumstances, includes (but not necessarily in all cases) the idea of intention or willfulness. A petition alleging willfulness, sufficient under the doctrine of "last chance," does not preclude an answer setting up contributory negligence conditioned upon the nonexistence of knowledge of plaintiffs' peril, and therefore of intention, actual or presumed. Only however upon the assumption that the allegation of willfulness, is intended to make the petition sufficient under the doctrine of "last chance," is willfulness material to plaintiff's cause of action.

If such is plaintiff's intention, the facts should be more specifically alleged. If plaintiff has no such intention it should be stricken out.

The motion to require the plaintiff to elect is therefore granted, not because willfulness is always incompatible with negligence, but because the plaintiff's petition should contain allegations which unconditionally, and not alternatively, preclude his own negligence as a directly contributing cause of his injury.

DITCHES—INJUNCTION—TOWNSHIPS.

[Montgomery Common Pleas, 1910.]

*A. C. McNELLY v. CLAY TOWNSHIP ET AL.

Duties of Township Trustees in Passing upon Acceptability of Ditch Work are Judicial and not Enjoinable.

The act of township trustees in passing upon the acceptability of work done by a contractor in the relocation of a ditch under Gen. Code 6606 is judicial in its nature, and not ministerial. Hence, in the absence of a showing of fraud and bad faith or irreparable injury, a court of equity will not interfere by injunction to restrain or control trustees in such action.

J. W. Kreitzer, for plaintiff.

R. R. Nevin and *E. G. Denlinger*, for defendant.

SNEDIKER, J.

This case is before the court on its merits for the allowance of a permanent injunction.

*Affirmed, no op., by the Circuit Court.

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One of the principal questions for our consideration in the case is whether the act of the township trustees in passing upon the acceptability of the work on the ditch in question is in its nature judicial or ministerial.

The necessity for the re-location of the ditch was first called to the attention of the trustees by the filing of the petition of A. C. McNelly and others. This was done under favor of R. S. 4514 (Gen. Code 6606). The proceedings of the trustees on the petition, and their finding that such relocation was necessary and advisable and should be ordered, was undoubtedly judicial, involving as it did a submission to them of a thing requiring the exercise of judgment and discretion, so much so that their decision is declared by law to be appealable to the probate court, which may retry the question, as provided by R. S. 4533 to 4539 (Gen. Code 6625 to 6631). This finding of the trustees was not appealed from, and after certain proceedings required and defined by law and agreed to by all the parties interested were had, the work of constructing the ditch was sold to the defendant, Jesse Landis, who went forward with it as soon as he came into possession of the necessary materials.

From that time on the work continued, with some interruptions, the duty devolving upon the trustees of passing upon it. This they were bound and privileged to do for two reasons:

First. Because as public officers representing the township the law places upon them the obligation to see that all public work coming within their jurisdiction is faithfully completed and to their satisfaction. With reference to this particular work the statute is specific in that regard.

Second. They were so bound to pass upon the work because of the provisions found in the specifications and contract for the work, that it should be "to the satisfaction of the trustees."

The contractor therefore had the right to demand their approval or disapproval, and was bound by it alone on final submission of his work either as a whole or in part. Their determination as to the completeness and satisfactory performance of the work involved on the part of the trustees the exercise not only of knowledge but of both judgment and discretion.

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The evidence in this case shows how different minds differ as to what is proper and necessary in this class of work, and gives ample room for the use of both judgment and discretion. It became necessary for them to use knowledge acquired by experience in like work; judgment in applying such information to the work before them, and discretion in determining the fact as to whether the work was performed substantially in such manner as to carry out the objects of the construction—promotion of the public health, convenience and welfare—and in accord with the specifications.

Being public work they as officers, and not any individual, must determine these questions, within the authority given them.

To say that this is merely a ministerial act would be to hold that there is to be no exercise of judgment or discretion on their part, and thus make it impossible for them to do the very thing required of them.

“A ministerial duty is one which involves simply the following of instructions.” *Rapalje & Lawrence Law Dictionary*.

“A ministerial act may be defined to be one which a person performs in a given state of facts in a prescribed manner in obedience to the mandate of legal authority without regard to the exercise of his own judgment upon the propriety of the act being done.” *State v. Nash*, 66 Ohio St. 618 [64 N. E. Rep. 558]; *Flournoy v. Jeffersonville (City)*, 17 Ind. 169 [79 Am. Dec. 468].

“A duty is ministerial when the law exacting its discharge prescribes the time, mode and occasion of its performance with such certainty that nothing remains for judgment or discretion. Official action the result of certain specific duties arising from fixed and designated facts is a ministerial act.” *Merlette v. State*, 100 Ala. 42 [14 So. Rep. 562].

On the other hand, “A judicial duty involves the exercise of judgment and discretion.” *Rapalje & Lawrence Law Dictionary*; *Reclamation Dist. No. 535 of Sacramento County v. Hamilton*, 112 Cal. 603 [44 Pac. Rep. 1074].

“An official duty involving the determination of facts is a judicial one.” *People v. Jerome*, 36 Misc. 256 [76 N. Y. Supp. 306].

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"When an act to be done by virtue of public authority requires the exercise of judgment and discretion, it is a judicial act." *Perry v. Tynen*, 22 Barb. 137, 140.

"A purely ministerial duty is one to which nothing is left to discretion. Where the officer is clothed with discretionary powers and is required to act upon his own judgment, the act is a judicial one." *Supra*.

Discretion is defined in *Judges v. People*, 18 Wend. (N. Y.) 99, as follows:

"It means, when applied to public functionaries, a power or right conferred upon them by law, of acting officially in certain circumstances, according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others."

The authorities are numerous which follow the above definitions. These are simply selected as sufficient for the purpose.

In view of the law under which the trustees are acting and of the duties imposed upon them, our opinion is that their act in passing upon this work is in its nature judicial.

This being true, the next question which presents itself is, as to whether the trustees can be controlled in the exercise of this function.

High, in his work on injunctions, says:

"It is important to observe that courts of equity do not interfere by injunction for the purpose of controlling the action of public officers constituting inferior *quasi* judicial tribunals, such as boards of supervisors, commissioners of highways, and the like, on matters pertaining to their jurisdiction. * * * A court of equity will not interfere with the exercise of their discretion, unless a strong case of fraud or irreparable injury is shown. And where they have exercised their discretion and made their decision in good faith, and without any intent of injuring or oppressing private persons, an injunction will not be allowed against their action." High, *Injunction* Sec. 1311.

In *Warfel v. Cochran*, 34 Pa. St. 381, 384, the court in speaking of the acts of road commissioners, which were there called in question, say:

"The road commissioners are intrusted with the jurisdiction

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of such matters, and are to decide both upon the need of such work, and upon the mode of doing it; and we are not clear that we ought, in any case, to control them by injunction, where they have authority to act."

In Mechem, Public Officers Sec. 990, the author says:

"In determining the cases in which a public officer may be restrained by injunction, it may first be noticed that the writ will not be granted to restrain a public officer from acting where he is proceeding by the authority and in pursuance of the law regulating his powers and duties, unless such law be unconstitutional or otherwise invalid. What a valid law authorizes the officer to do, the courts will not undertake to prevent, even though it be alleged that the officer is actuated by unworthy motives."

Sec. 991. "So it is well settled that where the law invests public officers with discretionary or *quasi* judicial powers in reference to matters within their jurisdiction, courts of equity will not interfere by injunction to restrain, control or review the exercise of the powers so conferred."

At Sec. 945:

"Where the law imposes upon a public officer the right and duty to exercise judgment or discretion in respect to any matter submitted to him or in reference to which he is called upon to act, it is, of course, his judgment or discretion that is to be exercised, and not that of any other officer or court. Courts, therefore, will not attempt by mandamus to compel the officer vested with such discretion to exercise it in any particular way, or to come to any particular decision, or to revise or alter his judgment when he has once exercised it."

22 Cyc., page 879: "Where public officials are intrusted with discretionary power in certain matters, their exercise of such discretion will not be controlled by injunction in the absence of any showing that their action is fraudulent or in bad faith."

These authorities make it clear that the plaintiff must show either bad faith and fraud or irreparable injury to move the court in this case.

Irreparable injury he does not claim in his petition, nor has he proven it.

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With respect to fraud and bad faith, his allegations are "that he believes and has reason to believe that they (the township trustees) are in some way interested with the defendant Landis in the construction of the ditch."

There was a total absence of proof bearing out this charge. Nor is it necessary to say that taking all the testimony together were such conditions proven as would warrant a fair inference of its truth.

That there is an honest difference of opinion as to the character and efficiency of the work up to this time is apparent from an examination of the testimony of the different witnesses, both lay and expert. We do not understand that under the state of facts it is our duty to decide which is the correct view. It would be idle to discuss and determine what has been done or should be done on the ditch, if we may not enforce our views, which it seems is true.

The trustees were present during the taking of all the testimony and ought to be able, therefore, to better exercise the discretion which the law gives them in the matter, and which we ought not and can not take from them, and which they should treat as a public trust faithfully to be performed.

Another claim of the plaintiff is for damages by reason of the manner in which the ditch has been constructed.

Following the authorities found in the brief of defendants we can not say that plaintiff has a cause of action against the township. So far as the trustees are concerned the conditions do not warrant a recovery against them.

R. S. 4550 (Gen. Code 6642) provides for action against the trustees for damages arising from a failure to perform any duty imposed upon them by Chap. 2, Title 6, but we do not understand plaintiff's claim to be of the character intended by this section. Even if it were so, original jurisdiction is in the justice of the peace.

As to the contractor, he sustains no contract relation with the plaintiff, and as the agent of the township he ought not to be charged as for a tort when obeying the instructions of the trustees as to the proper method of completing his contract.

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However, whatever damages plaintiff has so far sustained were not proven to be of any great amount, and may be said to be incidental to work of this character.

We are of the opinion that the prayer of the plaintiff's petition should be denied, which is accordingly done.

WILLS.

[Auglaize Common Pleas, July 16, 1913.]

HARRIET C. BLUME, ADMRX. v. CHARLES J. THOMPSON, ET AL.

1. Life Estate with Powers to Sell and Use for Comfort, Convenience or Benefit of Life Tenant Restricts Use of Income to Purposes Stated.

A devise to testator's widow "for and during her natural life only, except * * * that she * * * shall have the right to use, sell or dispose of * * * any or all of said property, real or personal, for her own comfort, convenience or benefit in any manner she may see fit during her lifetime," expressly creates a life estate in which absolute control does not amount to absolute ownership, and unqualified power of disposal does not enlarge the estate to a fee; her interest is less than a life estate in that she has no authority to use any portion of it, not even the income therefrom for any purpose other than that named in the will.

2. Phrase, "Except as Hereinafter Stated," in Will Giving Life Estate in all of Testator's Property.

A will in one item devising to his widow all the remainder of testator's property for and during her natural life, "except as hereinafter stated," with the understanding that she should have the right to use both principal and income "except as hereinafter stated" for her comfort, convenience or benefit during her lifetime, and in other items making bequests out of property remaining at or to take effect at her death, does not require that a fund be set aside and held separate and apart, sufficient to meet the legacies provided for in the subsequent items of the will; since the entire will evinces by its words an intent to hold the whole estate to meet the necessities of the widow; all bequests are subordinate to such provision and are not payable until her death unless she chooses to pay same.

3. Codicil Excepting one of Several Bequests to Churches Named Does not Affect Remainder of Bequests.

A codicil, revoking a bequest to one of several churches specifically named in a will but not revoking the bequests to the other churches designated, stating that testator had executed certain promissory notes to the church excepted, in lieu of such be-

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quests should be construed with the will itself as an entirety and does not interfere with or revoke the remainder of the church benefactions.

4. Option of Widow to Accept a Provision in Will is in Widow's Discretion.

A direction in a will to testator's widow to deposit a specified sum of money in a certain bank, the bank to pay her a stipulated rate of interest per year during her life, after which the money was to remain the property of the bank, and giving the widow the power to determine whether she accepts the provision or not, is complied with by giving a written notice to the bank and filing a copy with the probate judge; the bank has no vested interest in the estate unless the widow elects to pay over the money in question to the bank.

5. Board of Education May Accept Bequest for Public Library and Y. M. C. A. Building.

Under Gen. Code 4749 and 7631 to 7634, a board of education has authority to accept a bequest for the purchase of land and the erection and maintenance of a building for a combined public library and Young Men's Christian Association building for the use and benefit of all of the people of the school district.

6. Naming Beneficiaries but Incorrectly Numbering Them not Fatal Error.

Naming four beneficiaries in item of will as the "four" children of a known parent, with whom testator's family is on intimate terms, when in fact there were but the three children named, the other name being that of the parent will be considered an error or misunderstanding of the scrivener merely, and passes the bequest to each of the four persons named.

7. Item Cancelled and Revoked by Drawing Lines Across.

An item of a will through which the scrivener draws lines before the will is signed by testator and upon his express direction for the purpose of cancelling same, should have no force or effect whatever, for it is no part of the will as executed.

8. "Next" as Introductory Phrase in Item of Will Construed.

"I next give and bequeath" as introductory phrases of the later item of a will, imply inferior bequests to those in preceding items.

[Syllabus approved by the court.]

Halfhill, Quail & Kirk and Goeke, Anderson & Musser,
for plaintiff:

Construction, Page, Wills Sec. 558; 462, 470; *Goodwin v. Coddington*, 154 N. Y. 283. [48 N. E. Rep. 729]; Estate conveyed to widow, *Roberts v. Lewis*, 153 U. S. 366 [14 Sup. Ct. Rep. 945; 38 L. Ed. 747]; *Bishop v. Remple*, 11 Ohio St. 277; *James v. Pruden*, 14 Ohio St. 251; *Baxter v. Bowyer*, 19 Ohio St. 490; *Huston v. Craighead*, 23 Ohio St. 198; *Posegate v. South*, 46

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Ohio St. 391 [21 N. E. Rep. 641]; *MinYoung v. MinYoung*, 47 Ohio St. 501 [25 N. E. Rep. 168]; *Jeffers v. Lampson*, 10 Ohio St. 101; *Linton v. Laycock*, 33 Ohio St. 128; *Johnson v. Johnson*, 51 Ohio St. 446 [38 N. E. Rep. 61]; *Enyart v. Keever*, no op., 52 Ohio St. 631; *Greene v. Greene*, no op., 57 Ohio St. 628; *Campbell v. Greenawalt*, no op., 67 Ohio St. 520; *Shannon v. Shannon*, 23 Dec. 467 (13 N. S. 193); *Esman v. Esman*, 10 Circ. Dec. 257 (18 R. 603); *Armstrong v. Armstrong*, 31 O. C. C. 261 (11 N. S. 474); *Gogreve v. Day*, 30 O. C. C. 609 (10 N. S. 69); Widows limited power of disposal, *Minton, In re*, 160 Pa. St. 506 [28 Atl. Rep. 847]; *Wyatt, In re*, 9 Misc. 285 [30 N. Y. Supp. 275]; *Cashman, In re*, 28 Ill. App. 346; *Tooker v. Tooker*, 71 N. J. Eq. 513 [64 Atl. Rep. 806]; *Seaward v. Davis*, 198 N. Y. 415 [91 N. E. Rep. 1107]; *Hunt v. Smith*, 58 N. J. Eq. 25 [43 Atl. Rep. 428].

Trust to the board of education, *State v. Freed*, 6 Circ. Dec. 550 (10 R. 294); *State v. Perrysburg Tp. (Bd. of Ed.)* 27 Ohio St. 96; *McCortle v. Bates*, 29 Ohio St. 419, 422 [23 Am. Rep. 758]; *Brown Tp. (Bd. of Ed.) v. Cheney*, 5 Ohio St. 67; Page. Wills Sec. 616; Underhill, Wills Chap. 21, Sec. 455, 462.

Stueve & Tangeman and *Hoskins & Stout*, attorneys for defendant:

Cited and commented upon the following authorities: *Stuart v. Walker*, 72 Me. 145; *Bodman German Prot. Home v. Lippardt*, 70 Ohio St. 283 [71 N. E. Rep. 770]; *Baxter v. Bowyer*, 19 Ohio St. 490; *Johnson v. Johnson*, 51 Ohio St. 446 [38 N. E. Rep. 61]; *Shannon v. Shannon*, 23 Dec. 467 (13 N. S. 193); *O'Hara v. Peirano*, 19 Dec. 741 (8 N. S. 581); *Stokes v. Stokes*, 9 Dec. Re. 309 (12 Bull. 135); Jarman, Wills (5 ed.) 268; *Helfferich v. Helfferich*, 11 Dec. Re. 234 (25 Bull. 313); *Kent v. Morrison*, 153 Mass. 137 [26 N. E. Rep. 427; 10 L. R. A. 756; 25 Am. St. Rep. 616]; *Bragg v. Litchfield*, 212 Mass. 148 [98 N. E. Rep. 673]; *Romjue v. Randolph*, 166 Mo. App. 87 [148 S. W. Rep. 185]; *Luscomb v. Fintzelberg*, 162 Cal. 433 [123 Pac. Rep. 247]; *Roberts v. Lewis*, 153 U. S. 366 [14 Sup. Ct. Rep. 945; 38 L. Ed. 747]; *Bishop v. Remple*, 11 Ohio St. 277; *James v. Pruden*, 14 Ohio St. 251; *Huston v. Craighead*, 23 Ohio St. 198; *Posegate v. South*, 46 Ohio St. 391 [21 N. E. Rep.

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641]; *MinYoung v. MinYoung*, 47 Ohio St. 501 [25 N. E. Rep. 168]; *Euyart v. Keever*, no op., 52 Ohio St. 631; *Greene v. Greene*, no op., 57 Ohio St. 628; *Campbell v. Greenawalt*, no op., 67 Ohio St. 520; Page, Wills Par. 646; *American Tract. Soc. v. Atwater*, 30 Ohio St. 78 [27 Am. Rep. 422]; *Miller v. Teachout*, 24 Ohio St. 525; *Vance, In re*, 141 Pa. St. 201 [21 Atl. Rep. 643; 12 L. R. A. 227; 23 Am. St. Rep. 267]; *Jennings v. Jennings*, 21 Ohio St. 56.

MATTHIAS, J.

On July 4, 1912, L. N. Blume died, leaving Harriet C. Blume, his widow, his sole heir-at-law. His estate, at the time of his death, was valued at approximately \$125,000 above indebtedness.

On December 7, 1911, he had executed a will, which was duly admitted to probate, in the first item of which he expresses a desire for the prompt payment of his debts and funeral expenses. By item second he gives and devises to his wife, Harriet C. Blume, lot No. 18, situated in the village of Wapakoneta, county of Auglaize and state of Ohio, "to be hers absolutely and in fee simple."

Item 3 thereof is as follows:

"I give, bequeath and devise to my beloved wife, Harriet C. Blume, all the remainder of my property, both real and personal, of whatsoever kind and wheresoever situated, which I may own or have the right to dispose of at my death, for and during her natural life only, except as hereinafter stated, with the understanding that she, my said wife, shall have the right to use, sell or dispose of, except as hereinafter stated, any or all of said property, real or personal, for her own comfort, convenience or benefit in any manner she may see fit during her lifetime."

The fourth item of said will provides that, "out of the property remaining at the death of my said wife I give and bequeath the following amounts, respectively, to the following named persons in the order named, to wit:" Here follows a list of bequests to a number of individuals named, including therein the following clause: "To Harriet, Wesley, Lewis B.

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and Ethel King, the four children of Harriet King (a widow) formerly intermarried with Frederick Salla, my wife's brother, the sum of two hundred and fifty (\$250.00) dollars each." Item 5 is, "I next give and bequeath the sum of five hundred dollars (\$500.00) to each of the following named churches in Wapakoneta," and six churches are there named. Item 6 is, "I next give and bequeath the sum of five hundred dollars (\$500.00) to each of the following named lodges in Wapakoneta," naming six fraternal orders, and then provides: "Said sum to be paid to the proper trustees or officials of each of said societies."

Item 7 of said will is as follows:

"Provided there are sufficient funds left out of my estate after the payment of the bequests, legacies and devises made in this will, I next give and bequeath to the Board of Education of the School District of Wapakoneta, Ohio, the sum of fifty thousand dollars (\$50,000.00) or such other less sum as may be left for the purpose, for the purchase of the necessary land, erection of a building and maintenance of same, for a combined Public Library and Young Men's Christian Association, building, to be called the 'Blume Library and Y. M. C. A.,' for the use and benefit of all the people and citizens of Wapakoneta and vicinity the same to be in charge of and under the control of said Board of Education. All the above gifts and bequests are to take effect at the death of my said wife and are to be paid out of the property then remaining at her death, unless my said wife chooses to carry out any of said bequests before her decease."

The remaining portions of said will, copied in full, are as follows:

"Eight: I request and suggest to my said wife that as soon as convenient for my wife after my death that she, my said wife, shall pay over to the First National Bank, of Wapakoneta, Ohio, the sum of forty thousand dollars (\$40,000.00) in cash, stocks or bonds, acceptable to said bank, but only upon the condition and provides that the acceptance of the same be acted upon by the Board of Directors of said Bank by Resolution that

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said Bank shall pay to my wife as long as she lives Four (4) per cent. interest on said sum of \$40,000.00, payable semi-annually, and at the death of my said wife said sum of \$40,000.00 shall become absolutely the property of said bank; the carrying out of this Eight Clause of my Will and the payment of said sum of \$40,000.00 to said First National Bank of Wapakoneta, shall be entirely discretionary with and at the option of my said wife, and if she does not desire nor care for any reason to pay over said sum of \$40,000.00 to said First National Bank, then it shall not be obligatory upon her to do so and this clause shall be null and void."

*"Ninth: I desire and request that said First National Bank of Wapakoneta shall pay for one (1) year after my death one (1) per cent extra interest on all deposits during said year, and I give and bequeath to said Bank a sufficient sum of that purpose to be paid out of my estate."

"Ninth: All the residue of my property, real or personal, still remaining at the death of my said wife and after the payment of, above gifts and bequests, I desire shall go to and be divided between my lawful heirs, according to law, with the understanding that heirs of the half blood shall count and be considered the same as heirs of the whole blood, and provided further that Charles J. Thompson, my wife's nephew, shall receive a share of said residue of my estate the same as if he were a full and lawful heir, viz.: The same share as my half sisters and half brothers; and except that my sister, Harriet C. South and her three sons, Rufus B. South, Arthur L. South, and Dwight D. South, my nephews, shall receive no share of said residue nor any part of my estate whatsoever.

"I nominate and appoint Harriet C. Blume, my wife, to be sole executrix of this will and request that she be not required to give bond and that no inventory or appraisement be made of my estate."

*[This item appears in the will in question in the order and words as above, except that lines were drawn through and across the same and another item of the same number follows. Construed, post 532.]

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On May 11, 1912, testator executed a codicil to said will, which is as follows:

"I, L. N. Blume, of Wapakoneta, Ohio, do make, publish and declare this to be my codicil to my Last Will above set forth, I hereby revoke and annul the bequest of \$500.00 made to the Catholic Church of Wapakoneta, Ohio, as set forth in item fifth of my will, having recently executed and delivered two notes for \$500 each, payable to Wm. Russ of said Catholic Church, not yet due, which said notes shall be in lieu of the \$500, bequest to the other churches. I hereby ratify and confirm my said Will in all other respects."

Under favor of Gen. Code 10857 Harriet C. Blume, as executrix of said will, brings this action, and asks the direction and judgment of the court upon all of the provisions of said will that are in anywise ambiguous or uncertain, and that said will be so construed that plaintiff may be guided and instructed by the decree of the court as to the meaning, application and effect of the various provisions of said will, and that she be given such direction as is necessary to properly administer the trust imposed upon her by the terms of said will.

Said Harriet Blume, as the widow of L. N. Blume, under favor of Gen. Code 10567, has also filed an answer, in which she also asks such a construction of the terms of said will as is necessary to advise her of her rights thereunder so that she may be thus aided in making her election whether to accept the provisions of said will or take distributive share of said estate under provisions of the law.

The first question which arises, and the first particular in which we find it necessary to construe and determine the meaning of said will is with reference to the quality and quantity of the estate devised and bequeathed to said Harriet C. Blume. This question is foremost because the determination of others depends somewhat upon the conclusion reached with reference to this one.

Before taking up these various portions of this will, in what seems to us the most logical order, we deem it well to first indulge in some generalization with reference to the rules that must govern in the construction of wills. By "construction" as

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here used is meant the ascertaining and determining of the testator's intention as expressed in this will. As well suggested by Page, Wills Sec. 460, courts are careful to discover and enforce the testator's intention, but cannot make a new will for the testator, and it therefore follows that they constantly refuse to ascertain the testator's intention except from the words which he used in his will, together with such extrinsic evidence as is admissible. Hence, the question which the court must have constantly in mind is not what should the testator have meant to do, or what words he meant to use, but, rather, what did he mean by the words which he has actually used. Rules of construction adopted and followed are of value only for the purpose of ascertaining the intention of the testator. As stated by Chief Justice Marshall, in the case of *Finlay v. King*, 28 U. S. (3 Pet.) 345 [7 L. Ed. 701], "The intent of the testator is the cardinal rule in the construction of wills, and, if that intent can be clearly conceived, and is not contrary to some positive rule of law, it must prevail." In this connection we quote further from Page, Wills Sec. 461. "Assuming, as we must, in a case of construction that the testator had testamentary capacity at the time of making the will, that he was under no restraint, and the will as made is in full compliance with the rules of law on the subject, the sole question for the consideration of a court for construction is, what testator meant by the provisions of the will which he has seen fit to make. This proposition has been put by the courts in such a variety of forms, and with such uniformity of view, that it is hackneyed." It is also fundamental that the intention of the testator is to be ascertained from consideration of his will as a whole, and not from its disjointed fragments, and all parts of the instrument must be construed in relation to each other, so as to give meaning and effect to every clause and phrase. Hence, if two constructions are possible to a clause of a will, one of which is in harmony with the provisions of the remainder of the will, and the other of which is at variance with them, the court will assume that the correct construction is the one which will harmonize this clause with the rest of the will. The will is to be

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construed as an entirety, and if possible all provisions rendered consistent with each other. It is fundamental also that an obvious general intent gathered from the whole will is rarely to be defeated by an inaccuracy or inconsistency in the expression of a particular intent. These propositions that are to govern in the construction of wills are unquestioned, and we state them,—rather restate them, so that we may all have them clearly in mind as we take up for examination and construction the will before us.

Usually so-called precedents are of little value in the construction of a will, for the reason that wills vary so greatly in their terms, and a conclusion as to one may be, and usually is, of but little, if any, service in the construction of another. As once said by Judge Story, "the analogies afforded by precedents are helpful servants but dangerous masters." However, we find much aid in the decisions of the court of last resort of this state in the consideration of the nature of the estate taken by the widow under this will. We shall not undertake in this decision an analysis of each of the decisions in Ohio which is applicable, nor attempt a comparison of each of them with the case at bar.

The language used by the testator in the early case of *Bishop v. Remple*, 11 Ohio St. 277, is distinguished from that used by testator Blume in that there was no limitation whatever upon the right or authority of the wife to sell any portion of said estate; no limitation whatever upon the use to which said property or the proceeds thereof might be applied. Hence, in that case the court held that the widow had an absolute right to sell and convey. In the subsequent case of *James v. Pruden*, 14 Ohio St. 251, the testator used language in effect much the same as that used in the previous case cited, except that there was a limitation imposed by the words "for her benefit and support." The court there held that the declared purpose of the testator was to provide for the support of his widow. The court say:

"We are led to the conclusion that the will does charge upon the entire property the support of the widow and that she

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is entitled to use either principal or interest or both so far as may be necessary for this purpose; and that the heirs have a valid estate in remainder to what may be left when this object has been accomplished."

The decision of the court in *Baxter v. Bowyer*, 19 Ohio St. 490, is helpful in the consideration of the will before us—but the use and enjoyment of the estate there was unrestricted.

In the case of *Huston v. Craighead*, 23 Ohio St. 198, the court was called upon to construe a will in which, subject to the payment of his debts and certain legacies, the testator devised and bequeathed to his wife all his property, to be held by her during her natural life, provided she lived a widow; and declared it to be his will that she should have the entire management of his estate, and that she might sell and dispose of it "whenever and in such manner as she might "think best for herself and heirs;" and provided that at the death of his wife, whatever might be left of his estate after payment of the legacies and the debts of his widow, should be equally divided among his children, it was held, that the will did not give to the wife an absolute right to the personal property of the testator nor a fee simple in his real estate, but gives her a life estate and life support, with power to manage, sell and dispose of the property in any manner, that, in her judgment, will best promote her own welfare and benefit the estate; but she is not thereby authorized to dispose of the property by giving it to some of the children of the testator. The Supreme Court, in that decision, says (page 208) :

"It is evident the testator intended to confer upon his wife ample power to obtain a support from his estate, and had such confidence in her that he was willing to empower her to manage, sell and dispose of his estate in any manner that, in her judgment, would promote her own welfare, and best subserve the interests of the estate. Within the limits of the power thus conferred, her discretion is conclusive."

We refer to the language of the court in deciding the case of *Posegate v. South*, 46 Ohio St. 391 [21 N. E. Rep. 641].

"The bequest contained in the second item of the will, is absolute, and, unaffected by any other provision of the will,

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would vest in the widow, the unqualified ownership of the property bequeathed to her. If it be conceded, that the third item, which, at her death, gives the personal estate, or so much thereof as shall be unconsumed to the testator's children, so qualifies the previous bequest, as to reduce the estate given by it to the widow, to one for life, it must also be admitted, that it is a life estate with the right to the possession, use, enjoyment and consumption of the property by her, without restriction, either upon the mode of its use and enjoyment, or the extent of its consumption; for, it is only so much as shall remain unconsumed at the death of the widow, that is given over to the children, and no limitation is found in the will, upon the nature of the use to which she may subject the property, and her power to consume it is uncontrolled. Such right of use, enjoyment and consumption, necessarily implies the right to the possession of the property, since, without its possession, it could neither be used, enjoyed or consumed. The duty of the executor, under the will, therefore, was, after the payment of the debts and funeral expenses of the testator, to deliver possession of the personal estate of the widow."

The discussion of the court in the case of *MinYoung v. MinYoung*, 47 Ohio St. 501 [25 N. E. Rep. 168], is also of considerable force and effect in the consideration of the will before us. There, as here, the testator devised and bequeathed to his wife, substantially all his property and authorized the use for her comfort and convenience of all that, in her judgment, was necessary. The court there held that the widow took a life interest and a life support in the property with the right to control it and use the principal and income so far as may be reasonably necessary for her own comfort and convenience, subject to the trust of supporting and educating her son, as required by the terms of the will, and that the children took an estate in remainder to what may be left when such object shall have been accomplished, vested in interest, through contingent as to amount.

The decision of the court in *Johnson v. Johnson*, 51 Ohio St. 446 [38 N. E. Rep. 61], is not only instructive, but we believe absolutely controlling in the disposition of the question

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we have before us in this case. There Judge Burket, who delivered the opinion, reviewed not only the cases we have cited, but many others. This decision aids us materially, not only in determining the estate devised and bequeathed to Mrs. Blume, by this will, but it also clearly points out that the legatees named in this will have a vested remainder in so much of the estate as may remain unconsumed by Mrs. Blume at her death. The language used by the testator in the will before us, as did that in the will there considered, authorizes and requires that the widow be given full possession and power to use and dispose of said estate for her own support and places upon her the duty which is in the nature of a trust to have due regard for the rights of those in remainder as to the part of the estate not consumed by her for her support. Language used in the will there under consideration, much less clear in its terms of limitation than that used in the will before us was held by the court to show the plain intention of the testator that the property was "given to the widow to be by her used and consumed, and that while so using and consuming the same she is empowered to bargain, sell, convey, exchange or dispose of the same as she may think proper, limited, however, in the exercise of such power to the purpose for which the property is given to her, that is, for her consumption."

That the estate taken by Mrs. Blume cannot be more than a life estate with power to sell and dispose of any and all of such estate, but only for the purpose stated, we think is settled by the unbroken line of authorities, not only in this state but elsewhere.

In the case of *Bodman German Prot. Home v. Lippardt*, 70 Ohio St. 261 [71 N. E. Rep. 770; 1 Ann. Cas. 875], the court clearly states the rule applicable here to be,

"That when an estate is devised with an absolute power of disposal, a devise over of what may remain is void, but that where a life estate only is given in express words to the first taker, with an express power in a certain event, or for a certain purpose, to dispose of the property, the life estate is not by such a power, enlarged to a fee or absolute right, and the devise over is good."

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In this decision Judge Summers has collected and reviewed many decisions from which the rule thus stated is so clearly deduced.

Because we believe it especially applicable in the consideration of item three of this will we quote the following from one of the decisions cited by Judge Summers, that of *Stuart v. Walker*, 72 Me. 145, 148 [39 Am. Rep. 311]:

“Where the power of disposal is not an absolute power, but a qualified one, conditioned upon some certain event or purpose, and there is a remainder or devise over, then the words last used do restrict and limit the words first used, and have the force and efficacy to reduce what was apparently an estate in fee to an estate for life only. Thus: A gives an estate to B with the right to dispose of as much of it, in his lifetime, as he may need for his support, and if anything remains unexpended at B's death, the balance to go to C. Here there may be something to go over. B is to dispose of the estate only for certain specified purposes. He can defeat the remainder, only by an execution of the power.”

It is further shown in this decision that where the life estate is expressly created instead of arising by implication, absolute control does not amount to absolute ownership, and unqualified power of disposal does not enlarge the estate to a fee. This proposition is concisely stated by Page, Wills Sec. 576.

What then does Mrs. Blume receive by virtue of item 3 of this will, and what duties and obligations are imposed upon her thereby? We think the intention of the testator is clearly shown to be that, not only the use of the income from his property shall go to Mrs. Blume, but that all his property shall go to her with this limitation, that she may use the income and also consume any portion of the estate, but only so far as necessary for her own comfort, convenience or benefit. We regard this provision for Mrs. Blume as less than a life estate, although it may be more than a life estate in value because of the power conferred upon her to sell and use any or all of the estate for her comfort, convenience or benefit; but it is less than a life estate in that she is not authorized to use any portion of it,

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not even the income therefrom, for any purpose other than that named in the will.

The forepart of item 3 clearly gives to Mrs. Blume a life estate in all the property of the testator, except lot 18, which he had theretofore given to her absolutely, but the latter part of said item, while conferring power upon Mrs. Blume to sell and dispose of said estate, limits the use, not only of the principal, but of the income as well to the purpose therein stated, that is, "for her own comfort, convenience or benefit." After stating that Mrs. Blume shall have said property during her natural life only, such provision is qualified by limiting the use thereof, and consequently the income therefrom to the purpose therein expressly named. The same limitation is placed upon the use as upon the purpose for which sale may be made. This is an instance where "the words last used do restrict and limit the words first used," and it must be found, from a consideration of this entire will, that it was the intention of the testator that his estate, the income if sufficient, but the principal if necessary, should be used by Mrs. Blume "for her own comfort, convenience and benefit," but the use to which either the income or principle may be applied is to be limited to such purpose. It follows then that Mrs. Blume, under the terms of this will, would not be entitled absolutely to the income from this estate but only so much thereof as would be necessary for her own comfort, convenience and benefit, and if that were not sufficient for such purpose she could use any portion of the body of the estate necessary therefor. She could not use the income to build up a separate estate. Such conclusion must be declared from a consideration of the entire will.

The power of use and sale conferred in the will considered by the court in the case of *Huston v. Craighead*, 23 Ohio St. 198, was much broader than in this will: Neither is such unlimited power conferred here as by the will construed by the court in the case of *Posegate v. South*, 46 Ohio St. 391, the use given of the estate there was unlimited and unrestricted while here the right to use as well as the purpose of sale, is limited to "her own comfort, convenience and benefit." The same observation could be made of the will construed in *Baxter v. Bowyer*, *supra*.

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While the estate devised to Mrs. Blume is thus limited, the power vested in her is broad and the discretion confided to her is unlimited as to the manner of use, sale or disposition of said property, so long as it is necessary for her own comfort, convenience or benefit.

Here arises the duty devolving upon her as a Trustee of said fund for those in remainder, for that such is her relationship to the legatees named in this will we think there can be no question. The rule stated in *Johnson v. Johnson*, 51 Ohio St., 466 [38 N. E. Rep. 61], clearly applies; and while she can "use and enjoy the estate to its fullest extent for her support, and consume the whole of it if necessary, she could not go beyond what would be regarded as good faith toward the remainderman."

At this point we should probably give consideration to the question raised by counsel for the defendants as to the meaning of the clause twice used in item 3, "except as hereinafter stated." We cannot acquiesce in the suggestion made that it was the purpose of the testator to have set aside a fund sufficient to meet the legacies named in items 4, 5, 6 and 7, of this will, and the same "held separate and apart to be kept intact and sacred for the purposes of paying the same to these respective parties." In our opinion the language of the entire will cannot be so construed. The one desire testator does make plain is that his entire estate shall be held to meet the necessities of his wife, and all bequests are subordinate to the provision for her and are to be paid out of what remains after she is cared for, and cannot be paid until after her death except so far as she chooses to pay them. The clause referred to need not and should not be given any consideration whatever if in subsequent portions of the will no exception is made to which said clause may have reference. Such exception or limitation cannot apply to the bequest named in the fourth item, for that immediately follows the item in which such clause is used and there not only the time, but the limitation of payment of those bequests is emphasized by testator, by stating at the very beginning of the item making such bequests, "out of the property remaining at the death of my said wife, to the following

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named persons in the order named," The first, "except as hereinafter stated" may, and probably does mean, that while she has all of said property during her natural life only, yet that she is free to dispose of any of it in any manner she sees fit, if for the purpose stated, and thus by this clause her right of use is expanded rather than limited. The same clause repeated after giving authority to use, sell or dispose of, seems to contemplate the making of such a limitation later in the will. We have seen that there is no such limitation in item 4. Neither is there in item 5, for the bequests named in item 4 are to be paid out of property remaining at the death of the wife, and the bequests named in item 5 are inferior to those named in item 4, for the testator says, "I next give and bequeath," and the bequests named in item 5 are such that neither takes precedence over the other. Neither is there any such limitation specified in item 6, for those are given and bequeathed "next," meaning after the payment of the bequests named in item 5. Certainly such limitation is not made in item 7, for that provision is contingent upon the sufficiency of said estate to meet it "after the payment of the bequests, legacies and devises made in this will." That no such limitation had been made anywhere in said will up to the eighth item, as it seems the testator contemplated in the beginning of said will he would subsequently state, is settled beyond dispute by the language used in the latter part of item 7; "All the above gifts and bequests are to take effect at the death of my said wife and are to be paid out of the property then remaining at her death, unless my said wife chooses to carry out any of said bequests before her decease." No such exception is stated in either item 8, 9 or 10. It seems plain that if the testator contemplated, at the beginning of the preparation of his will, to make some exception as to the use or disposition of his property, he, upon further consideration, did not make or express exception or limitation, other than that which may appear in item 9, so called, which was cancelled by having lines drawn through it before the will was in fact executed.

The first statement of said clause in item 3 may have had reference to the subsequent provision authorizing the wife to pay any of the bequests named at any time she desired. No such

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exception having been expressed by the testator whereby the right conferred upon the wife to possess and control all of said property during her lifetime is limited or abridged it follows that the right of use and enjoyment, coupled with the power to sell and dispose of said property for the purposes stated in any manner she may see fit, "necessarily implies the right to the possession of the property, since, without its possession, it could neither be used, enjoyed or consumed." In this particular the rule laid down in *Posegate v. South, supra*, applies and after the payment of the debts and funeral expenses of the testator it will become the duty of the executrix to deliver possession of said property to Mrs. Blume, the widow, who will hold it in trust for the legatees named in said will, subject to her right to use so much of the estate as necessary "for her comfort, convenience and benefit."

Under the authorities we have cited the legatees named and referred to in said will have a valid estate in remainder to what may be left of said property referred to in item 3, after the objects and purposes stated therein shall have been accomplished.

The next question presented arises in the consideration of item 4, which contains a number of bequests, among them being one "to Harriet, Wesley, Lewis B., and Ethel King, the four children of Harriet King, (a widow) formerly intermarried with Frederick Sallada, my wife's brother, the sum of two hundred and fifty (\$250.00) dollars." The evidence shows that there are but three children of Harriet King referred to, being Wesley, Lewis B., and Ethel; it further appears from the evidence that the relations of the testator with this family have been close, they having visited frequently and that he well knew the members of the family and that there were but three children, all of whom are grown, two being married. There is here a devise to Harriet King, and it is shown that there is but one Harriet King who could possibly have been intended and it must be concluded that probably, by error, or misunderstanding of the scrivener, the word "four" instead of "three" was used. The names of the legatees are stated and each of the four named persons is entitled to the legacy bequeathed.

By the fifth item of said will the testator bequeaths five

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hundred dollars to each of the churches of Wapakoneta, therein named, and directs that said sum be paid to the proper board of officials of each of said churches. By codicil heretofore stated the bequest of five hundred dollars to the catholic church is specifically revoked and annulled. A question has arisen as to the effect of the codicil upon the bequest to the other churches named by reason of the language used by the testator for the evident purpose of stating his reason for revoking the bequest to the catholic church. Following such revocation, "having recently executed and delivered two notes for five hundred dollars each payable to William Russ of said catholic church, not yet due, which said note shall be in lieu of the five hundred dollars bequest to the other churches." There is no revocation of the bequest to the other churches specifically stated, and it cannot be concluded that the phrase "in lieu of" as here used was meant to work a revocation of such bequest. We apply, in the consideration of this question, the rule stated in Page, Wills Sec. 462: "Where a codicil is appended to a will and does not contain any clause of revocation, the provisions of the will are to be disturbed only as far as are absolutely necessary to give effect to the provisions of the codicil; and in other respects such a will and codicil are to be construed together." Undoubtedly the testator not having revoked the bequest to the other churches, means by the language used in stating the reason for revoking the bequest to the catholic church that while that church has been given the two notes instead of the bequest theretofore made, each of the other churches is to have the bequest theretofore made in behalf of each.

The amended petition sets out, with precision, the name of each of these churches, and also fixes clearly the identity of the lodges referred to in item six. We find that each of said churches named in item fifth, and more particularly described in the amended petition herein, excepting herefrom, of course, the catholic church, is entitled to receive the bequest of five hundred dollars. We further find that each of said lodges named in item 6, and clearly identified in the amended petition herein, is entitled to the bequest of five hundred dollars.

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The bequest to various churches should be paid at the time indicated in said will, payment to be made to the treasurer of each church upon acceptance of bequest by resolution of the board of trustees or council thereof as the case may be.

The bequest to each of said lodges named to be paid at the time indicated in said will, payment to be made to the treasurer or officer of each lodge having charge of its finances, upon acceptance of such bequest by resolution duly passed by the respective lodges.

Although our attention has been directed by counsel, in argument, to item 8 of said will, and the suggestion made that the court should determine and state its construction, or, rather, its interpretation thereof, and state the rights of Mrs. Blume under this item if she take under the will and rights if she take under the law, it is not claimed by any of counsel that such item gives rise to any trust or amounts to more than a mere suggestion, that Mrs. Blume pay over \$40,000 in cash, stocks or bonds to the First National Bank of Wapakoneta, and that the bank pay her four (4) per cent interest thereon and that upon her death said \$40,000 become absolutely the property of the bank; the testator then adds that such payment shall be entirely discretionary with and at the option of his wife and if for any reason she does not care to pay said sum to the bank, then it shall not be obligatory upon her to do so, then this clause shall be null and void. Undoubtedly Mrs. Blume may exercise the option given and pay over said \$40,000 to The First National Bank in the manner and upon the terms stated in said eighth item, and if accepted by the bank, upon the terms stated in said item eighth and said terms complied with the bank, said \$40,000 would become absolutely the property of the bank upon the death of Mrs. Blume. However, the interest paid her by the bank could not be used in any other manner than that which we have announced heretofore, that is, only so far as necessary for "her comfort, convenience and benefit." The nature of this provision is such that the bank has no vested interest whatever in said estate, unless Mrs. Blume elects to pay over said \$40,000 to the bank, in the manner specified in said item eight.

It was suggested by council that the court show how Mrs.

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Blume may best indicate her purpose with respect to the suggestions made in said item. Her purpose in this matter ought to be in some manner determined and announced. We know of no better way to suggest that this be done than by giving a written notice of her conclusion with reference to this matter to the bank, and filing a copy thereof in the proceeding now pending in the probate court.

In this connection perhaps we should consider also the latter part of item 7 of said will, and determine its effect. We are clearly of the opinion that said clause is not limited to the provisions of item 7 of said will, but has reference to all of the gifts and bequests named in said will preceding such clause, and that none of the gifts and bequests named in said will preceding item 8 do take effect until the death of Mrs. Blume, and that they are to be paid out of the property remaining at her death, but Mrs. Blume, whom we have found is entitled to the possession of all of said estate after the payment of the debts, may carry out any of said bequests before her decease. Unlimited authority is given, and unhampered discretion is confided to her to consummate any of the gifts and bequests named in said will preceding item 7 at any time. Said clause refers rather to what precedes item 7, for that bequest is contingent upon the sufficiency of the estate to pay the preceding "bequests, legacies and devises."

Hence, if she pay them, she may determine the order in which they shall be paid; she may pay none of them. She may pay all of them. If they are not paid by Mrs. Blume during her lifetime, then we think it the purpose of the testator that all of the legacies named in item 4 shall be considered as a class to be paid before legacies named in any subsequent item but that the full amount stated is to be paid to each in the order named, as indicated in the beginning of said item, and that they would not pro rate if the estate was not sufficient to pay all. After the payment of the legacies named in item 4 those named in item 5, as modified by the codicil, would be paid, and if there was not enough of said estate to pay all, they would pro rate. If the estate remaining were sufficient to pay the bequests named in item 4 and 5, the next paid would be those named in item

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6, and if said estate were not sufficient to pay all named in item 6, that those would pro rate, no preference being given by the testator.

In another connection we have referred to a clause in said will preceding item 9. The evidence shows that, by direction of the testator, the scrivener drew lines across the same for the purpose of cancelling and revoking that clause before the will was signed, and it appeared also before the remaining portions of the will were written for, that clause was numbered "Ninth", and the item which follows it, as the will was executed, is also numbered "Ninth". Therefore, no force or effect should be given to said clause.

This brings us to a consideration of the seventh item of said will. The plaintiff asks the court to determine whether the benefaction named therein is a lawful one and whether the board of education of the school district of Wapakoneta, Ohio, may receive any money for the purpose named in said item 7.

It is urged that while a board of education may take and hold, in trust, any devise, bequest or donation, such taking and holding is limited to the use and benefit of such district, and that they may exercise such powers and privileges as are conferred by the laws relating to the public schools of the state. This is the provision of Gen. Code 4749, but Secs. 7631 to 7642 contain provisions conferring much greater authority than the bequest here in question. Gen. Code 7631 provides that,

"The Board of Education of any city, village, township or special school district, by resolution, may provide for the establishment, control and maintenance, in such district, of a public library, free to all the inhabitants thereof. For that purpose, by purchase, it may acquire the necessary real property, and erect thereon a library building; acquire, by purchase or otherwise, from any other library association, its library property; receive donations and bequests of money or property for such library purposes and maintain and support libraries now in existence and control by the Board."

Gen. Code 7632 authorizes a levy of not to exceed one mill for library fund, to be expended by the board for the establishment, support and maintenance of such public library.

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There can be no question then as to the authority of the board of education of the school district including Wapakoneta to receive a bequest and use the same for library purposes. The question then arises whether such bequest shall fail because of the provision in said item seven that such building shall be maintained for a public Library for Young Men's Christian Association Building. Trusts created by gift in the interest or promotion of education are universally recognized as charitable, and are to be liberally construed and operated to the end that the intention of the donor may be carried out as near as can be done under all the circumstances. They are highly favored by the law and should receive such construction as would tend to preserve rather than to destroy them.

Pomeroy, Eq. Jurisp. Sec. 1023; *McIntire Poor School (Tr.) v. Manufacturing Co.* 9 Ohio 203 [34 Am. Dec. 436]; *Zanesville Canal Mfg. Co. v. Zanesville*, 20 Ohio 483; *Miller v. Teachout*, 24 Ohio St. 525; *Fairfield Tp. (Bd. of Ed.) v. Ladd*, 26 Ohio St. 210.

Among the charitable trusts most liberally construed, have been those created for the promotion of religion and education.

Sowers v. Cyrenius, 39 Ohio St. 29 [48 Am. St. 418]; *Rockwell v. Blaney*, 22 Dec. 107 (9 N. S. 495), and cases there cited.

Surely then unless this trust is impossible of execution, it should not be permitted to lapse. It is held in *State v. Toledo*, 13-23 O. C. C. 327 (3 N. S. 468), that "Although such power is not expressly conferred a municipality has authority to receive property in trust for educational and other purposes beneficial to its inhabitants." It does not appear to us that this trust is impossible of execution by the trustee named; if it were, rather than permit the trust to fail, we think the rule would apply which would authorize a court of equity to appoint a trustee. The exercise of the powers conferred by the trust we do not believe inconsistent with duties imposed upon boards of education. By the law of the state Young Men's Christian Associations seem to be regarded as belonging to the class known as "Charities", and are authorized to accept

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legacies, devises and bequests. They therefore cannot be regarded as incompatible. It is to be observed, too, that this bequest to the board of education is "for the purchase of the necessary land, erection of a building and maintenance of same, for a combined public library and Young Men's Christian Association Building, to be called the 'Blume Library and Y. M. C. A.,' for the use and benefit of all the people and citizens of Wapakoneta and vicinity, the same to be in charge of, and under the control of said board of education." The board is authorized to use this bequest for the purchase of land and the erection and maintenance of a building thereon, which building is to be in charge of and under the control of said board. The bequest is not made for the maintenance of a library or the management or maintenance of a Y. M. C. A., but rather to provide and maintain a building, insofar as the funds will serve that purpose, which building is to be given the name specified.

It is our opinion that the authority of the board of education is ample to receive this bequest and execute the trust which it carries.

Consonant with the letter and spirit of Gen. Code 10857 and 10567, we have endeavored to definitely determine and clearly state the rights of the parties and organizations named or referred to in this will, and particularly to advise the executrix as to her duties and the widow as to her rights under said will.

A journal entry should be prepared in accordance with these conclusions, the costs of this proceeding to be paid out of the funds of the estate.

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EMBEZZLEMENT.

[Medina Common Pleas, January Term, 1912.]

STATE OF OHIO v. CHARLES H. GUNKELMAN.

Defalcation by Public Officer of Public Funds Used by Him for Personal Use, Necessary to Effect Crime of Embezzlement.

The use of public funds by an official in whose custody they are placed by law does not constitute an embezzlement under Gen. Code 12873, unless there is a defalcation on the part of such official; hence, the mingling of school funds by a treasurer of a board of education with his own, drawing checks in payment of his own debts against the combined funds and paying out part of such public funds for his own use, do not, after the public money has been reimbursed in full, there being no defalcation of any part thereof, effect an embezzlement of public moneys by such officer.

[Syllabus approved by the court.]

MOTION to direct verdict.

Charles H. Gunkelman, the defendant herein, was indicted for embezzlement. To the indictment certain demurrers were filed and duly overruled and thereafter the defendant entered a plea of not guilty, and was placed upon trial, evidence was introduced on the part of the state establishing, or tending to establish the following allegations and facts, viz.:

1. In the month of February, 1909, the defendant, Charles H. Gunkelman, was the duly elected, qualified and acting treasurer of the township of Liverpool, Medina county, Ohio, and as such treasurer was *ex-officio* treasurer of the board of education of such township. For some eighteen years he had been in the business of a merchant and private banker, at the village of Liverpool, some ten miles distant from Medina.

2. On February 23, 1909, as such treasurer he received from the auditor of Medina county, Ohio, two certain warrants aggregating \$4,687.56, and being the distributive share of taxes due the township of Liverpool and the board of education from the county auditor.

3. On the same day, the treasurer of Medina county issued to Charles H. Gunkelman, a certain check in the amount of

*Affirmed, no op., *State v. Gunkelman*, 87 O. S. 000; 57 Bull. 488.

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\$4,687.56 upon the Old Phoenix National Bank of Medina, Ohio, one of the county depositories, being given in payment for the auditor's warrants aggregating that amount.

4. Charles H. Gunkelman, thereupon deposited the check in the bank to the credit of his private account. At the time the check was so deposited the said Charles H. Gunkelman had a credit in his account in the bank of approximately \$150.00, but which balance was subsequently reduced by the payment of certain checks issued by him prior to that date, but which were presented for payment thereafter.

5. Following this deposit the defendant issued certain checks aggregating \$2,100.00 against his bank account, to various persons as separately alleged in each count of the indictment, which checks were given in payment of personal debts of the said Charles H. Gunkelman, and which checks were paid by the bank on presentation and charged to his account.

6. At the time that said checks were issued and paid accused had no other funds in the bank and in his account, other than as heretofore set out. The warrants, treasurer's check, bank book of Charles H. Gunkelman, and the checks issued by Charles H. Gunkelman on said bank were all admitted as evidence.

At the close of the evidence on the part of the state the defendant moved the court to instruct the jury to return a verdict in his favor for the following reasons:

1. That the indictment does not charge an offense under the laws of the state of Ohio.

2. That all of the evidence introduced by the state does not show the commission of any offense by this defendant under the laws of the state of Ohio, and that the evidence offered by the state has failed to make out a case against the defendant under the indictment or any of the counts thereof.

On the part of the state it was contended that all the elements necessary for the state to fully establish and prove its case, were:

1. That the defendant, Charles H. Gunkelman, was a public officer as charged in said indictment.

2. That as such public officer he received and came into

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possession and custody of the public funds as designated in the indictment.

3. That he converted, misappropriated or otherwise used the public funds, or some part thereof, in some one of the manners and ways prohibited by said Gen. Code 12873.

Arthur VanEpp, Pros. Atty., and *F. W. Woods*, Asst. Pros. Atty., for plaintiff:

Cited and commented upon the following authorities: *State v. Pierson*, 83 Ohio St. 242 [93 N. E. Rep. 967]; *Myers v. State*, 2 Circ. Dec. 712 (4 R. 570); *United States v. Gilbert*, 4 O. F. D. 251; *Hartford Twp. (Bd. of Ed.) v. Thompson*, 33 Ohio St. 321; *Davis v. Gelhaus*, 44 Ohio St. 69 [4 N. E. Rep. 593].

Frank Heath, attorney for defendant:

Cited and commented upon the following authorities: *State v. Meyers*, 56 Ohio St. 340 [47 N. E. Rep. 138]; *Hancock Co. (Comrs.) v. Bank*, 32 Ohio St. 194; *Shultz v. Cambridge*, 38 Ohio St. 659; *Hall v. State*, 20 Ohio 8; *Smith v. State*, 25 O. C. C. 22 (1 N. S. 493); *State v. Durslinger*, 73 Ohio St. 154 [76 N. E. Rep. 291]; *Buckman v. State*, 81 Ohio St. 171 [90 N. E. Rep. 158]; *State v. Laning*, 18 Dec. 681 [7 N. S. 345]; *State v. Brandt*, 41 Iowa 593; *State v. Parsons*, 54 Iowa 405 [6 N. W. Rep. 579]; *Hale v. Richards*, 80 Iowa 164 [45 N. W. Rep. 734]; 15 Cyc. 333, 496; *State v. Moyer*, 58 W. Va. 146 [52 S. E. Rep. 30]; *State v. Leonard*, 56 Wash. 83 [105 Pac. Rep. 163].

STROUP, J. (Orally.)

We will take up for decision the second paragraph of the motion made by the defendant to direct a verdict, which second ground is that all the evidence introduced by the state does not show the commission of any offense by this defendant, under the laws of the state; and that the state has failed to make out a case against the defendant, etc.

Every crime in Ohio is defined by statute. I will go over some of the decisions, briefly, as to how the courts are to construe statutory crimes.

"A criminal statute is to be strictly construed, and its language is not to be extended beyond its fair interpretation, to the prejudice of the accused." *Smith v. State*, 25 O. C. C. 22 (1 N. S. 493).

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Again: "Penal statutes are to be construed strictly, and can not be extended by implication to cases not falling within their terms." *Hall v. State*, 20 Ohio 8.

Again: "Where an act is made punishable by fine and imprisonment, the words in which the offense is defined and punishment prescribed must be strictly construed, whether they are found in a statute, or an ordinance or by-law." *Shultz v. Cambridge*, 38 Ohio St. 659.

And in a recent case: "It is a familiar and fundamental rule of interpretation which requires that in the construction of a statute or constitution, meaning must, if possible, be given to every part and word." *State v. Durflinger*, 73 Ohio St. 154, 159 [76 N. E. Rep. 291].

These words are used in Gen. Code 10214.

"The provisions of part third and all proceedings under it, shall be liberally construed, in order to promote its object, and assist the parties in obtaining justice."

This is with reference to remedies, I suppose, and procedure. Further quoting:

"The rule of the common law, that statutes in derogation thereof must be strictly construed has no application to such part;,"

Particularly applicable at this time is this provision:

"But this section shall not be so construed as to require a liberal construction of provisions affecting personal liberty, relating to amercement, or of a penal nature."

This same statute was cited and commented upon in *State v. Laning*, 18 Dec. 681, 693 (7 N. S. 345), and the court of Huron county, I think, said this, in reference to this statute, that

"The rule of strict construction in criminal matters is jealously guarded."

Again, a more recent case: "The object of judicial investigation in the construction of a statute is to ascertain and give effect to the intent of the law-making body which enacted it." *Buckman v. State*, 81 Ohio St. 171, 178 [90 N. E. Rep. 158].

The intention of the law-makers is to be—"collected from the causes of the law, its scope, its object, its language, its purposes expressed in its title and context and the manifest incentive

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for their enactment as evidenced by the circumstances attending its passage, all harmonizing." *State v. Laning, supra.*

In the case of the *State v. Meyers*, 56 Ohio St. 350, 340 [47 N. E. Rep. 138], the Supreme Court of this state uses these words:

"And, under that fundamental rule of strict construction applicable to all penal laws, a statute defining a crime cannot be extended by construction to persons or things not within its descriptive terms, though they may appear to be within the reason and spirit of the statute. Persons cannot be made subject to such statute by implication."

The words that I now read are applicable.

"Only those transactions are included in them which are within both their spirit and letter; and all doubts in the interpretation of such statutes are to be resolved in favor of the accused."

Now, that being the law which must govern this court, let us look to the statute under which the defendant in this case is indicted which is Gen. Code 12873, and is what is called the "public officer embezzlement statute." It provides that,

"Whoever, being charged with the collection, receipt, safe-keeping, etc., of public money * * * who converts it to his own use, etc., shall be guilty of embezzlement of the money or other property thus converted * * * and shall be imprisoned in the penitentiary not less than one year nor more than twenty-one years, and (not or) fined double the amount of money or other property embezzled."

The next section provides, that this fine shall "operate as a judgment at law * * * and be enforced to collection * * * for the use only of the owner of the property or effects so embezzled."

Referring now to Gen. Code 13674; this statute provides that failure or refusal to pay over public money—I am not quoting the exact words—or part thereof, or to account to, or make settlement with a legal authority, shall be *prima facie* evidence of the embezzlement thereof.

Now, what do these statutes mean? It will be noticed that the section I first quoted, Gen. Code 12873, provides that when

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a party pleads guilty, or is found guilty, the court must not only sentence him to the penitentiary for a period not less than one year nor more than twenty-one years, but the court must furthermore—and it is as imperative in one as in the other—fine him double the amount of the money embezzled.

Another statute which, while it was in force, was analogous to this, was the old statute which provided that when one sells liquor to a minor, he should be fined and imprisoned. The courts were called upon in cases under that statute not only to fine the defendant, but also to imprison the defendant. I think that law has since been changed, and the word, “or,” has been used in the place of “and.”

Now, the *State v. Myers, supra*, to which I have referred, is a case where Meyers was indicted as a deputy auditor, for embezzlement under this section of the statute. Judge Williams, in construing the meaning of Gen. Code 12873, or R. S. 6841, uses these words at page 345:

“The question raised by the demurrers, and presented by the exceptions, is whether this section applies to a deputy county treasurer who misappropriates the public moneys in either of the modes forbidden by the section. In the determination of the question, other statutory provisions may properly be considered, especially those of section 7299,” that is the present *prima facie* statute, only the number is different—“which, with the provisions of section 6841,”—the public officer embezzlement statute,—“were originally enacted in what is known as the independent treasury act, passed in 1858, and together constituted but one section, (section 15) of that act. The section was divided in the codification of the statutes, and the parts assigned to their appropriate places, as they now appear in the criminal code, without material alteration; the one being placed in the chapter in which crimes and offenses are defined, and the other in that regulating criminal procedure. The latter, now section 7299, reads as follows,” etc.

At page 346, Judge Williams says:

“It will be noticed that by its terms, section 6841 is restricted in its application, to persons who are ‘charged with the collection,’ ” etc.

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Later on, he says:

“And the limitation is carried through section 7299, which declares that any failure or refusal to pay over, or to produce the public money, etc., shall make a *prima facie* case of embezzlement.”

At page 347, he says:

“From these provisions, it seems reasonably certain that the persons who are subject to prosecution under section 6841, are those only, who are charged by law with the performance of the duties, or some of them, therein mentioned,” etc.

I refer to this, only, as showing that in construing one, the Supreme Court looks as well to the other.

And again, on page 348, the Court says:

“And the application of both sections, 6841 and 7299, to such officers and persons, is clear and indisputable.”

It can be seen upon reading Gen. Code 12873, it clearly was not the intention of the legislature, where money has been paid back into the township treasury, and the public is not the loser, that a defendant shall be imprisoned in the penitentiary and also fined double the amount of the money. So, then, we have to look to the rules of law which I have mentioned, to ascertain the intent of the law-making body at the time these sections were enacted.

We know that it was the common experience of treasurers, up to within just a recent time, to take moneys which they had in their custody, public moneys, and use it in their business. They felt that they had a right to do it; they had given a bond to the public officers. They thought they had not only a right to use that money, but up to recently they felt they had a right to the interest on that money, as long as bond was given, which they regarded as safeguarding the rights of the public, in obligating them to make their settlement and turn the money over; and so far as the public was concerned, they were not interested further; the public was only interested in finally knowing and feeling that the public money was forthcoming, when a settlement was made, and the official books were presented and they showed that fact.

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It was at such a time the law as to the embezzlement by public officers was enacted.

In construing Gen. Code 12873, according to the rules by which it is to be construed, and considering the other section of the statute, Gen. Code 13674, which was enacted at the same time, it seems to me one can come to the conclusion only that the intention of the law-making body at the time the same were enacted, was to provide for a crime only where a treasurer converted the money to his own use and defaulted. If such was not the intention, the statute, when it prescribes the punishment, would read, in substance: "shall be imprisoned so and so in the penitentiary, and in case the money is not forthcoming, or there is a defalcation, the defendant shall be fined double the amount of the money embezzled," but in a case where there is no defalcation, the punishment is merely a punishment in the penitentiary.

Motion to direct a verdict for defendant sustained.

ATTORNEYS—COMPENSATION—PARTNERSHIP.

[Hamilton Common Pleas, 1913.]

HERMAN P. GOEBEL V. ALBERT BETTINGER.**1. Law Partner after Dissolution of Firm Performing Extraordinary Services Entitled to Extra Compensation.**

Where one partner of a law firm after dissolution performs extraordinary services in conducting to a successful termination litigation pending at the time of the dissolution, he will be entitled to extra compensation for such work.

2. Measure of Compensation for Extraordinary Services of Partner after Dissolution of Law Firm in Contingent Fee Case Determined by Rule of Forwarding and Trial Attorneys.

The amount of such extra compensation necessarily depends upon the circumstances of each case. Where B, after dissolution of G and B, tried a case in the circuit court, in which the firm secured for their client a verdict for \$18,000, and after reversal by the circuit court re-tried the case in the common pleas, circuit and Supreme Courts and secured an affirmance of a verdict for the same amount, B performing very extraordinary services, and a fee of \$3650 being contingent upon a successful issue, B is entitled to two-thirds of the fee and the firm G and B to the remaining one-third on the analogy to the custom existing between forwarding and trial attorneys.

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3. Salary of Congressman as Law Firm Credit in Continuing Arrangement not Gift upon Dissolution of Partnership.

G and B were law partners sharing equally in the profits. During the existence of the firm G was elected to congress, his term beginning March 4, 1903, after his election. Each month he received \$416.66 as salary and \$100 for clerk hire. G did not leave to take his seat in congress until November 6, a year after his election. On that day a conference took place between the partners. The evidence showed that G consented to be charged with \$4300 of his congressional salary and that B consented that the firm should continue, G to receive one-sixth of the profits and to retain his future congressional salary. A few days after the agreement B dissolved the firm, dissolution to take effect December 1, G consented. Held, the charge of \$4300, congressional salary against G, will not be allowed in an accounting between the partners, it being the intention of the partners that the charge should be made only in the event that the partnership should continue. Such charge cannot be considered a gift or an account stated against the partner as there was no intention to regard it as such.

[Syllabus by the court.]

ACCOUNTING.

Healy, Ferris & McAvoy, for plaintiff.

Peck, Shaffer & Peck, for defendant.

MAY, J.

This is an action for an accounting.

Herman P. Goebel and Albert Bettinger were law partners, each drawing one-half of the net earnings of the firm of Goebel and Bettinger. The partnership originally began about 1881 and lasted until 1884, when Herman P. Goebel was elected probate judge of Hamilton county, Ohio. The firm then dissolved and Albert Bettinger continued the practice of law alone. Early in the nineties, after Judge Goebel's retirement as probate judge, the partnership was renewed. At the November election of 1902 Judge Goebel was elected congressman from the second Ohio Congressional District. His salary as congressman was \$5000 per annum and began March 4, 1903. In addition to his salary he drew \$100 per month for clerk hire or secretary's salary. He received at the expiration of each month two checks, one for \$416.66, congressional salary, the other \$100 for secretary's salary. On the books of the firm, under date of November 10, 1903, appears the following entry:

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"Herman P. Goebel received salaries drawn by him as M. C., being nine months ending December 1, 1903, \$4300.00; Cash, debit, \$4300.00; Cash, credit, \$4300.00; practice, credit, \$4300.00."

and on the ledger of the firm Judge Goebel is charged with having drawn \$4300, the entry being made to correspond with this entry in the cash book.

The firm was dissolved by mutual consent on December 1, 1903, without any agreement as to how the affairs of the partnership should be wound up, though by consent no public announcement of the dissolution was to be made until after Judge Goebel's return from congress. The announcement was made, however, in May, 1904. After the dissolution Mr. Bettinger continued the business under the firm name and brought to a successful termination many important cases then pending in the various courts, both state and federal. Judge Goebel also closed certain pending matters, though he did not appear in any active litigation. Since 1904 many attempts were made by both members of the firm to settle by arbitration or otherwise their controversy. Finally, in October, 1911, after all efforts for an amicable settlement had been abandoned, this action for an accounting was begun by Judge Goebel, and Mr. Bettinger in his answer and cross petition joined in the prayer.

At the request of the parties and their counsel, the case was not referred to a master, but was tried to the court. The hearing occupied more than a week.

At the hearing each partner submitted a statement of the work he had done in the winding up of the affairs of the partnership and a detailed statement of the amount of the fees collected in the settlement of the firm's business.

Mr. Bettinger claimed that on account of the extraordinary services he had performed in many cases he was entitled to extra compensation for such services. Judge Goebel disputed the right of either partner to such extra compensation, and claimed that upon dissolution a partner, in the absence of an agreement for compensation, is not entitled for services rendered in the winding up of the business of the firm, citing *Cameron v. Francisco*, 26 Ohio St. 190.

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At the argument the court announced that while that was the law in reference to mercantile or trading partnerships there was an exception made in professional partnerships owing to the character of the services rendered, citing a dictum of Mr. Justice Strong in *Denver v. Roane*, 99 U. S. 359 [25 L. Ed. 476]

Counsel for Judge Goebel then agreed that an allowance for extra compensation should be made to each partner for the work done by each after the dissolution of the firm and further consented that this allowance should be in accordance with an apportionment made by Mr. Bettinger in all cases, both those conducted by Mr. Bettinger as well as those closed by Judge Goebel, with the exception of the apportionment as made in the matter of *America Bennett*.

The justice of allowing extra compensation to one partner who performs extraordinary services after dissolution, in the winding up of professional partnerships, is now well recognized by the American courts. The dictum of Mr. Justice Strong in *Denver v. Roane*, *supra*, has already been referred to. This was followed in *Osmont v. McElrath*, 68 Cal. 466 [9 Pac. Rep. 731; 58 Am. Rep. 17]. It was also approved and applied in *Lamb v. Wilson*, 3 Neb. (Unof.) 496 [92 N. W. Rep. 167]. The same principle was adopted even in mercantile partnerships. *Schenkl v. Dana*, 118 Mass. 236; *Condon v. Callahan*, 115 Tenn. 285 [89 S. W. Rep. 400; 1 L. R. A. (N. S.) 643; 112 Am. St. Rep. 833; 5 Ann. Cas. 659]; *Maynard v. Richards*, 166 Ill. 466 [46 N. E. Rep. 1138; 57 Am. St. Rep. 145]; *Robinson v. Simmons*, 146 Mass. 167 [15 N. E. Rep. 558; 4 Am. St. Rep. 299]; *Hoag v. Alderman*, 184 Mass. 217 [68 N. E. Rep. 199]; 1 Lindley, Partnerships * p. 380 and notes; 2 Bates, Partnership Sec. 373.

The consent of Judge Goebel to the amounts as fixed by Mr. Bettinger in all cases except the *Bennett* case has relieved me of much labor and embarrassment. The most difficult and disagreeable task that confronts the active practitioner is the fixing of his fees for professional services rendered. If he meets with such difficulty, how much more difficult and disagreeable must it be for a judge, especially one who knows the parties so intimately, to settle such questions and to make an equitable ap-

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portionment. At the hearing I made repeated requests for expert testimony to assist me in arriving at a satisfactory conclusion on the question of fees, but in each instance counsel stated the court could judge of such compensation as well as other lawyers. The facts of the Bennett case are as follows:

Bennett had been in business as a member of the Peck-Williamson Furnace Company and had been forced out; he subsequently organized a new company and soon thereafter Williamson made a contract with him to buy him out for a large sum of money. Bennett was not only to deliver the stock of the new company, but also all machinery, patterns, etc., used in the business and to agree not to engage in the furnace business within five hundred miles of Cincinnati for a given period of years. Bennett delivered the stock but could not perform his agreement as to the property because this was held by a corporation and he had no authority to sell out the business. A receiver was then appointed for the corporation and its property was sold. At the sale Bennett was out-bid by a man, Swan, who bid in the machinery and some of the patterns, and Williamson refused to complete the contract of purchase with Bennett because he did not deliver the property. The purchase price for the whole agreement was \$30,000. Of this \$12,000 had been paid on delivery of the stock. Bennett then resolved to sue for breach of contract. At this time he lived in Detroit and the Detroit lawyer came to Cincinnati and consulted with the firm Goebel & Bettinger, his interview being with Judge Goebel. As a result of this interview a suit was brought and the case went to trial on the fifth amended petition. At the first trial both Judge Goebel and Mr. Bettinger appeared. Judge Goebel left during the progress of the first trial, after the case had been submitted to the jury. A verdict of \$18,000 was returned for the plaintiff Bennett. The case was taken on error to the Hamilton county circuit court and after dissolution of the firm was argued in that court by Mr. Bettinger for the defendant in error, Mr. C. B. Matthews appearing for the plaintiff in error. The circuit court reversed the case for error in the charge of the court and upon the weight of the evidence. Mr. Bettinger then prepared the case for re-trial. At the second

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trial Mr. C. B. Matthews was assisted by Judge Miller Outcalt. During the second trial Mr. Bettinger realized that unless Bennett's testimony to the effect that Swan, who had purchased the machinery at receiver's sale, was really acting for Williamson could be corroborated there could be no recovery. Mr. Bettinger learned that Swan was at Sioux City, Iowa, and on Friday of the week of the second trial he sent Mr. Kreis of his office to find Swan. Mr. Kreis was successful and on the Monday following Swan was brought to Cincinnati and was produced at the psychological moment much to the consternation of the defendant. The jury found again for plaintiff, returning a verdict for the same amount, to wit: \$18,000. The case was taken to the circuit court and there affirmed. It was then taken to the Supreme Court, in which court the plaintiff in error, the defendant below, in addition to being represented by Mr. C. B. Matthews and Judge Miller Outcalt, had the assistance of Mr. John W. Warrington, now the presiding judge of the circuit court of appeals for the sixth judicial circuit. Notwithstanding the strong array of able counsel, the judgments of the Hamilton county circuit and common pleas courts were affirmed, and Mr. Bettinger collected the \$18,000 judgment. The total fee charged by agreement was 20 per cent, or \$3650. During the trial Mr. Bettinger advanced money to Mr. Bennett for his personal support.

Mr. Bettinger contends that a fair value of his services rendered after dissolution is \$3150, and that a fair value of the firm's services is \$500. Judge Goebel contends that the fee of \$3650 should be apportioned equally, that is, \$1825 to the firm and \$1825 to Mr. Bettinger.

I am now called upon to settle this controversy. What then is the true standard of apportionment?

There can be no doubt of the extraordinary services rendered in this case by Mr. Bettinger. Without his skill, his energy and his indefatigability at the second trial the plaintiff Bennett would not have recovered anything and the firm's labor, as well as his own, would have been for naught. At the same time it must not be forgotten that had this Bennett case not been a firm asset Mr. Bettinger would not have had the business. He

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also acquired some familiarity with this case during the firm's existence, that is, at the first trial.

If this had been an ordinary case where the services of counsel would have been remunerative irrespective of a successful termination, I am inclined to believe that an equal division of the fees between the firm and Mr. Bettinger would have been just and equitable, but, taking into consideration all the circumstances in the case, the one trial by Mr. Bettinger alone in the circuit court, then the re-trial of the case in the common pleas, circuit and Supreme Courts, laboring against C. B. Matthews, reinforced by Judge Outcalt and Judge Warrington, a galaxy of unusual ability, the contingency of the fee, the dramatic incident of securing the witness Swan, without whose testimony the case could not have been won, and the risk of the whole litigation, I am of the opinion that Mr. Bettinger is entitled to more than an equal division of the fee.

I believe in this particular case the firm should be considered as forwarding attorneys and Mr. Bettinger as an attorney to whom the case has been sent for trial, and that the usual custom existing between forwarding and trial lawyers as to division of fees, namely, one-third and two-thirds, should be observed.

I am therefore of the opinion and so find that of the fee, \$3650, the sum of \$1216.66 should be credited to the firm and that Mr. Bettinger should be credited for his extraordinary services with the sum of \$2433.34.

In the decree stating the accounts between the partners, as stated above, the apportionment should be made in accordance with this finding in the Bennett case and the other accounts as apportioned by Mr. Bettinger and agreed to by Judge Goebel.

There remains but one important item, probably the rock upon which the parties split, namely, the manner of accounting as to the congressional salary charged.

Judge Goebel was elected to congress in November, 1902; his salary began March 4, 1903; he did not leave Cincinnati until November 6, 1903, being called to Washington by a special session of congress that was called to meet November 9, 1903. Under the federal law Judge Goebel received at the end of each

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month \$416.66, congressional salary, and \$100 allowance for clerk hire. This is the only fact upon which there is an agreement in the testimony, except that on November 6, 1903, there was a conversation between Judge Goebel and Mr. Bettinger.

Mr. Bettinger testifies that on the forenoon of November 6, 1903, "Judge Goebel said to him that he was going away and that there ought to be some understanding about this, what shall we do, do you want the firm to be dissolved or do you want it to be continued on some equitable basis of distribution. I said, judge, no, I don't care about dissolution; we have been together so long I would really prefer if we could make some equitable arrangement to continue on unless your congressional career takes you off into other fields of like kind, then of course it would be different. But I said, before we get to the matter of distribution or dissolution or arrangement for future business, there is one matter that has been upon my mind for some time, and it is this, you have been drawing a salary now for some time, you have deposited that on your own account, you never said a word to me about it one way or the other; you have been devoting a good deal of your attention in the last two or three years toward the accomplishment of that purpose, and I have been extremely active in the business every day and night and Sundays, all the time, and you have not; and I don't think it is right for you to have an equal division of all this that comes in here, you should share with me what you have got in that way. Well, he said, what do you propose about that? That is not the language but along that line, and he brought up an argument in favor of his retention, etc." Mr. Bettinger then went on to state that the bookkeeper presented a statement of the account as it then stood between the partners, showing that there was a difference between them in his favor of about \$5326.19. Mr. Bettinger then went on to say: Well, in the course of the consultation, but in what point of the discussion I cannot say, but in the course of the discussion, by way of argument I said, judge, you must know that for the last two or three years I have been bringing in the firm a great deal more money than you and have done a great deal more work. There was then some further figuring and talk about this latter matter.

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Mr. Bettinger then went on to say that he and Judge Goebel continued figuring about the amount coming to each and about the business brought in by each and the amount withdrawn by each, and then went on to testify that Judge Goebel agreed that he should be charged with \$4,300, saying: "Then we dropped \$200 off the clerk's salaries, that made \$4353, and we agreed that it should be \$4300. I said, will you have that entry made; he said, yes, I will have the entry made. Now let us take up the other matter. Then I said we have previously figured it, I have not gone into the figures here; but we had previously figured out that way an average income for a certain number of years, whether it covered the whole period of the partnership or a limited number of years I don't remember, but we figured out that the average yearly income was \$13,000, that one-half of it was \$6,500 the last two or three years we had done much better than that, we had some very poor years, in fact our business had grown in the last few years. Now we had previously discussed his duties as congressman and he wanted to be free and untrammelled in giving his attention to all the necessary duties of that office and that he could not give necessarily the attention to the law business. Now I said, judge, in order to get a basis of figuring if I take this as an average, it will serve as a basis for our future earnings, if we take this as an average; taking then an average of \$6500 a year, I mean \$13,000 a year, you would get if you were here, giving your whole time and attention to it, you would get one-half of that; if now you are at liberty to go away and engage in some other pursuit and give your whole time and attention to that and don't have to give it to this and you get one-third as much as you would get if you gave your whole attention, then I believe that would be a fair disposition of it; you being allowed to keep as your own undivided anything that you earn, either in your new office or anything else. He did not seem to understand it, I explained it three or four times, finally I figured it out here. The figures are then shown. Mr. Bettinger then went on to say: He put down some figures, I don't know what they were, and spoke of his real estate, and we discussed that the last fifteen or twenty minutes and along this line;

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but the one-sixth division, we came back to that and he asked again about that and I explained that to him again, I went over it again just as I had done before and I argued that if he got one-third as much without having any responsibility or any duty with reference to it, as I got when I had the responsibility, that I thought it was reasonable. He said, very well. Then I said, Judge, we never had any agreement between us in writing in all these years we have been associated together; but this being different from anything we ever had will you yourself draw a line embodying that agreement. The reason for my asking him that was because I was being called for in the other room, by that time there were a number of persons waiting for me and I said, will you draw that paper; he said, yes, I will; it was then pretty near the lunch hour, 1 o'clock or something along there, between twelve and two, anyhow it was midday; he went away and I saw nothing more of him after that, but when I came back to the office he had left this memoranda for me on the same paper: "Dear Albert: I have something to do at home and must go. You can draw the mem and send it to me at Washington. Goodby, Yours, Herman."

Judge Goebel testifies that he had a conversation with Mr. Bettinger between five and six on the afternoon of November 6, just before taking the 6 o'clock train for Washington, but that nothing whatever about the congressional salary was mentioned.

Mr. Bettinger left the city on Saturday, November 7, going to Brown county to visit his daughter, who was there at school; while there he thought about this matter and on November 12, a few days after his return to Cincinnati, he wrote Judge Goebel a long letter, in which he says, among other things:

"All these considerations (referring to certain matters that he and the judge had talked about) were doubtless in your mind when you suggested even a dissolution of our partnership as a solution. You saw further than I did and it has taken me all this time to reach the conclusion that the severance of our interests brought about by your new field of activity requires a dissolution of our partnership * * *. To convey

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to you my thoughts of the dissolution would have been a most painful task indeed if you had not yourself given expression of such a thought as a possible sequence of the new condition, but even now I needed all the will power I could summon.

"I trust that the process by which a separation of our interest may be reached will be marked by that same warmth of friendly feeling which has attended all our intercourse with each other and that when it shall have been accomplished our friendship with each other may continue to the end. You need not hasten your return on this account as I will hold all things in abeyance until you conveniently return."

Judge Goebel replied to this letter under date of November 13, in a very caustic manner. He agreed on the question of dissolution, and upon his return to Cincinnati about November 16, it was mutually agreed between the partners that the dissolution should take place as of December 1, 1903; that no public announcement should be made until after Judge Goebel's return from congress, but, as stated above, the announcement was made in May 1904.

The testimony of Miss Stauss, the bookkeeper, is to the effect that on November 6, Judge Goebel dictated to her the entry, which she afterwards made under date of November 10 in the cash book and the ledger, regarding the \$4300 charge. The discrepancy between the date of dictation and date of entry she stated was due to the fact that where entries were made upon a blotter she entered them in the books of the firm whenever she had time.

As already stated, Judge Goebel denies absolutely that there was any conversation regarding this entry.

On the part of Judge Goebel it is claimed that there is no proof of the agreement and that if the agreement is as stated there is no consideration for the same.

On the part of Mr. Bettinger it is contended that the consideration for Judge Goebel's agreement to be charged with \$4300 upon the books of the firm was due to the fact that he had been engaged in politics and therefore could not have given all of his time to the business of the firm, and also that this charge should be considered in the nature of a gift and

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that there could be a delivery of this by Judge Goebel's direction to have it placed upon the books as a charge against him, and further that it should be considered as an account stated between the parties.

I do not think that it can be considered as an account stated. An account stated must be founded on previous transactions of a monetary character regarding the relations of debtor and creditor between the parties. There never was any intention between the parties to state an account between them at this time, November 6, 1903.

In the view that I take of the testimony, I think it unnecessary to decide on the question of the weight of the evidence. This case was tried on April 24, 1913, nearly ten years after the conversation of November 6 took place. It is but natural that the parties, interested as they are, taking into consideration their present state of feelings and relations, should be mistaken as to what actually occurred between them on November 6, 1903.

In putting the proper construction upon the conversation of November 6, I must take into consideration all the circumstances then existing and the natural and probable attitude of the parties. And after carefully weighing all the surrounding circumstances of this case, I am of the opinion that a conversation did take place on November 6 regarding this dissolution, and I am further of the opinion and do find that this agreement was that in consideration of the partnership continuing under the firm name of Goebel & Bettinger, Judge Goebel to receive one-sixth of the partnership profits and to be allowed to retain all his congressional salary, he was to consent to be charged on the books of the firm with having received \$4300, an amount equal to the amount of the congressional salaries that approximately would have been earned by December 1, 1903, and that when Judge Goebel directed the bookkeeper to make this charge of \$4300 he was performing his part of carrying out this agreement, and that when, on November 12, 1903, Mr. Bettinger wrote to Judge Goebel that after careful consideration of the matter in Brown county the Sunday after the conversation he thought for the best interests of all that the

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partnership should be dissolved, that that put an end to the agreement, and therefore Judge Goebel cannot be charged in an accounting with this entry of \$4300. It seems to me that this would be the natural conduct of the partners. I cannot believe that one partner, who is entitled to an equal share in the firm's business, would willingly consent to relinquish so large an amount in the firm's profits unless there was some consideration by way of continuance of the partnership.

It is strongly urged that this was a gift and that all the delivery that could be made was made, to wit: an entry upon the firm's book, citing *Polly v. Hicks*, 58 Ohio St. 218 [50 N. E. Rep. 809; 41 L. R. A. 858].

Conceding that this is true, there must, however, be an intention to make a gift and I do not find that the evidence warrants such a conclusion.

Taking the view that I do of the evidence, namely, that this charge of \$4300 was to become effective only in the event that the partnership continued upon the terms it is alleged were agreed upon between the parties, it is unnecessary for me to consider the questions raised by counsel as to whether or not there was a valid consideration for making the charge because that question could only arise if there had been an agreement between Judge Goebel and Mr. Bettinger to the effect that Judge Goebel consented that he be charged with the \$4300. As already stated, it is but natural that the recollection of the parties, ten years after the conversation took place, should be at variance and that there should be gross discrepancies in their testimony. A careful reading of all the testimony and the exhibits in this case, as well as the briefs of counsel, only confirms my opinion as hereinbefore set forth.

An accounting will be allowed in this case and in the decree that is to be prepared the apportionment as made by Mr. Bettinger of the fees collected both by himself and Judge Goebel are to be allowed, and in the Bennett matter the firm is to be credited with one-third of the fee and Mr. Bettinger personally with two-thirds. The charge of \$4300 on the books as a charge against Judge Goebel will be disallowed.

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CORPORATIONS—PROCESS—RECEIVERS.

[Fulton Common Pleas, June 23, 1913.]

ROWLEY, RECEIVER v. GEORGE W. GRIFFIN.*1. Action to Enforce Stockholder's Liability Proceeding in Rem and Stockholders not Necessary as Parties.**

An action in sequestration under Gen. Code 8690 et seq., against a bank in the hands of a receiver and its stockholders to enforce their double liability is a proceeding in rem and not in personam; hence, notwithstanding Gen. Code 8693 requires all stockholders to be made parties, the corporation is the representative of all the stockholders to fix the extent of indebtedness of the insolvent corporation and to determine the amount of assessment to be levied upon the stockholders thereof, and service on stockholders by summons or publication is unnecessary.

2. Defendant in Action to Collect Assessment on Stockholder's Liability May Deny and Prove Falseness of Finding of Liability as Stockholders Previously Declared in Action Against Corporation.

In an action against an insolvent bank and its stockholders under Gen. Code 8690 et seq., the receiver determines and reports and the court reviews and confirms the findings of the receiver as to the amount of indebtedness of the corporation, the necessity for and amount of assessment against the stockholders, which are conclusive against stockholders though not enforceable by execution and levy. Hence, such facts having been alleged by the receiver in his petition in an action to enforce collection of an assessment against a stockholder, and denied by defendant in his answer and cross petition, while the receiver is not put to proof thereof, the defendant has the right to prove and show as a defense that he is not the owner of the stock assessed, and demurrer to such answer will not lie.

3. Constructive Service in Suit Against Bank and Stockholders Invalid Against Stockholders Resident of State and County in Locality of Action.

Constructive service by publication in a newspaper in an action against an insolvent bank and its stockholders is abortive and of no effect against a stockholder, a life resident of this state and a nearby county in which he was a man of affairs, a banker and insurance agent, visiting often and known by interested parties in the county seat where the action is instituted, especially since, instead of being a supposed nonresident of

***Note.**—Since the opinion in this case was filed, the defendant filed an amendment to his original answer and cross petition; the cause was reheard and the court adhered to his former opinion, holding also that the matter contained in the answer and cross petition collaterally attacked the Lucas county judgment.—Editor.

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the state, he was a person whom a receiver of the defunct bank ought to have known and whose residence he could have discovered by ordinary diligence.

[Syllabus approved by the court.]

DEMURRER to answer and cross petition.

Holbrook & Banker, for plaintiff.

Frank S. Ham, for defendant.

SCOTT, J. (Orally).

This action is submitted upon two separate demurrers and a motion interposed by the plaintiff, the receiver, to and against the answer and cross petition of the defendant Griffin. The demurrers the court has numbered one and two, so that the record may show a separate disposition of the same. The petition in this case is one of great length, somewhat verbose, and sets forth in every detail all of the material matters that are necessary and that enter into a petition of the character of this.

The action in this court is to enforce an assessment or judgment rendered against the defendant Griffin in the court of common pleas of Lucas county, Ohio, in an action pending in that court, entitled, *Central Savings Bank Co. v. Union Central Savings Bank Co. et al.* The action in that court was instituted for the purpose of recovering a judgment against the defendant in favor of the plaintiff in the sum of \$1,556.95. The original petition in that action was filed January 25, 1904. It was afterwards amended by the filing of an amendment thereto. The purpose of the amendment is not of any consequence at this time, so far as the rights of the parties to this action are concerned. This amendment to the petition in that case was filed May 20, 1908, and the action in that court then proceeded upon its way to final determination. This is a very brief statement of the substance of that action, and this pending in this court at this time. To this petition in this court a demurrer was interposed and disposed of some time prior to the opening of the present term. The defendant Griffin then filed an answer and cross petition, so-called, and to this answer and cross petition the plaintiff filed these two several demurrers numbered and also filed a motion against the cross petition, asking that the answer found in the answer and cross petition be stricken out.

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We come first to dispose of this motion because of the fact that it is a very easy matter to get rid of. It has no substance. It possibly was filed for the purpose of puzzling some one, but it hasn't served even that purpose. The motion is overruled, with exceptions.

We now come to a more difficult question, and we take up first, demurrer number two, which in substance reads as follows:

The plaintiff comes by his attorney, and demurs to that part of the defendant's answer claiming that plaintiff's pretended cause of action as set forth in his petition is barred by the statute of limitation, on the ground that on its face such defense is insufficient in law. This demurrer searches the record. It goes back and touches even the petition filed in this case. The petition in this case avers, among other things, that on January 29, 1912, this assessment or judgment was so levied or rendered by the Lucas county common pleas court, against the defendant Griffin, so that whatever liability arose against Griffin by reason of his having been a stockholder of the defunct, the Union Central Savings Bank Company, grew into life January 29, 1912, this finding against Griffin against a stockholder was fixed, and that court found and entered a judgment against Griffin in the sum of \$601.90. Up to January 29, 1912, no finding had been made against the defendant Griffin as a stockholder of the defunct company, so that the statute of limitation could not begin to run until a finding was had against him, and that finding, as appears by the record here, was made and had and entered on the date last mentioned. It follows, therefore, that the allegation in the answer and cross petition of the defendant Griffin in this case, in substance alleging that the statute of limitation has run in favor of Griffin, and has barred any action that might be had against him by reason of his having been a stockholder in said defunct bank, does not come within the purview of any statute of limitation barring an action of that character.

The statute of limitation in an action to enforce the liability of a stockholder in an Ohio corporation probably is one of six years, but we are not called upon to pass on the question as to whether the six year limitation obtains, or some other limitation.

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We are clearly of the opinion that the action against the stockholders in the Lucas common pleas cause, and especially against the stockholders, the defendant Griffin here, was not barred by the statute of limitations, for that but a brief period of time had run, in fact, before the bringing of the present action in this court.

Demurrer number two will be sustained.

We come now to dispose of demurrer number 1, which raises many tangled and twisted questions, and goes to the substance of the entire record in this case, the demurrer, which in substance is as follows:

The court has no jurisdiction of the subject-matter. We need not waste any time upon the discussion of this ground of the demurrer, as to this ground it is overruled. The second ground of demurrer number two, in substance, reads: The cross petition does not state facts sufficient to show a cause of action.

Briefly stating the history of the Lucas common pleas case, to which reference has been made, it appears that an abortive attempt was made in that case to obtain constructive service upon the defendant here, George W. Griffin, by means of publication in some newspaper in that county of general circulation. It is questioned seriously in this answer and cross petition of the defendant Griffin in this case, whether or not any affidavit as required by Gen. Code 11293 was ever filed in the Lucas county case, for the purpose of obtaining constructive service; but whatever service or alleged service was obtained, we find was fatally illegal and void, for the reason that Griffin was supposed to be a resident of Lafayette, Indiana, his residence was fixed as being in that foreign state and in that city, whereas in truth and in fact, as a great many people know, and those that do not know ought to know, that Mr. Griffin has resided in the little city of Fayette in Fulton county, for nearly his entire lifetime, at least fifty years. It is alleged in the answer and cross petition that Griffin was well known in the city of Toledo, that the receiver knew him, that he was a man of affairs in this part of the country and especially in and around the community of Fayette, that he was a banker for six years, that he was an

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agent of the Union Central Life Insurance Company for many years, that he visited Toledo many a time and oft, in season and out of season, that he visited at the home of McAfee, one of the stockholders in the defunct banking company, and because of these visits, and because of the long stated residence of Griffin, the defendant, in this part of the country all these years, it is charged in the answer and cross petition that the receiver ought to have known his residence, and if he did not know it, he could have discovered it by the slightest use of ordinary diligence, or any diligence. Therefore, as it is alleged in the answer and cross petition, the pretended service by publication, the constructive service attempted to be made upon Griffin, was never made, and that the attempt was an abortive one and that the act was a foolish and frivolous one. And so we are led to the conclusion that no service whatever was ever had upon Mr. Griffin in the Lucas common pleas.

It is alleged in the answer and cross petition, and is not denied by any person who has an interest in this action, that no actual service was ever made upon the defendant, Griffin, in that sequestration case in Lucas county; Griffin never entered his appearance in that case. He was, however, actually made a party defendant, and charged to have been a stockholder in the defunct company, in the action in Lucas county.* But he was named in that action by his initials, "G. W. Griffin," and not as George W. Griffin. We are now called upon to determine the all-important question in this case as raised by the second ground of demurrer number one, and decide whether or not any service whatever was necessary to have been made in that Lucas county case upon Griffin, in order to give the court jurisdiction in that case, through the receiver, or in any other way, to levy an assessment against Griffin, a stockholder in the defunct banking company, or to render a judgment against him for the alleged statutory double liability as a stockholder in that company. We may hesitate long enough to say now that this action in this court is one to enforce a double liability against a stockholder in an Ohio corporation, which liability was created by the constitution of 1851 of our state, and was afterwards, if not self-acting, put in action and operation by a cer-

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tain act of the legislature of our state. And whatever liability arose against Griffin as a stockholder in that company became full of life prior to the adoption by the people of the state of an amendment to the constitution, doing away with double liability as fixed under the old constitution. And this amendment to our constitution, destroying the double liability under the old constitution, became effective, as we remember it, in the year 1903. Under Gen. Code 8690 to 8697 a way has been laid out by the legislature, directing the proceedings in an action to enforce liability against a stockholder in corporations. I need not recite these acts of the legislature. They are familiar to every practicing attorney. But among other things, Gen. Code 8693 requires that all officers and stockholders be made parties in such actions. The question arises now as to whether or not this requirement stated, that all stockholders be made parties in actions, sometimes called actions in sequestration, actions to enforce statutory liabilities, shall be summoned and brought into court; or is it true that the corporation in which any person against whom suit may be brought to enforce the statutory liability, represents the stockholder in such suit? If that doctrine be true, that is, if the corporation in which a person against whom an action is brought to enforce the statutory liability, is the representative of all of the stockholders in such actions, then we are of the opinion that no service of summons or by publication need be made in an action of that kind.

When a party subscribes his name as a stockholder of a corporation in Ohio, and agrees to take a certain number of shares of stock, he enters into a sort of contractual relation, not with the corporation itself or with its officers or agents, but with the creditors of the corporation, if the corporation shall ever have any creditors after its organization. And this double liability, about which we have been speaking, is a matter of protection to the creditors of the corporation, a thing to protect them in the future, a thing to protect them in bringing about payments to such creditors of any legal obligations that may be entered into between them and the corporation.

We call counsel's attention to a recent case of the U. S. Supreme Court, *Converse v. Hamilton*, 224 U. S. 243 [32 Sup.

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Ct. Rep. 415; 56 L. Ed. 749]. This was an action originally brought in the courts of Wisconsin to enforce a double liability against the stockholders in an insolvent Minnesota corporation; and in this case it appears that the question was raised in the lower court that no service whatever was made on two of the stockholders of this Minnesota corporation, and after the sequestration suit had ended, or partially ended, in the courts of Minnesota, the receiver sought to enforce a stockholder's liability against Hamilton and another in the courts of Wisconsin, in the circuit court of Dane county, and the petition filed by the receiver in that court to enforce the liability was attacked by demurrers, and upon other grounds, and one of the grounds upon which the fight was waged in the Wisconsin courts was that no service of any kind had ever been made in the sequestration suit in Minnesota against these two foreign stockholders. The case went to the supreme court of Wisconsin, and the stockholders won out in that court; *Converse v. Hamilton*, 136 Wis. 589 [118 N. W. Rep. 190]; and the receiver then took a writ of error to the Supreme Court of the United States, which reversed the lower courts as well as the supreme court of Wisconsin, and held that under the legislative enactments of the state of Minnesota, it was not necessary that any notice be given to stockholders in a sequestration suit, or in a suit to enforce a stockholder's liability, for that the corporation having become defunct, dead, possibly insolvent, being in court, was the representative of every stockholder of that corporation.

But what puzzles us somewhat in disposing of this intricate question is that Minnesota has its statute, which provides in substance as follows, speaking of an order and assignment against a stockholder made by and through a receiver, and then confirmed by a court. Section 5 of that act says:

"Said order and the assessment thereby levied shall be conclusive upon and against all parties liable upon or on account of any stock or shares of said corporation, whether appearing or represented at said hearing, or having notice thereof or not, as to all matters relating to the amount of and the propriety of and necessity for the said assessment. This provision shall also ap-

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ply to any subsequent assessment levied by the court as hereinafter provided."

Now, I can readily see why under an enactment of this kind, no process need issue in an action to enforce a stockholder's liability, because it is done away with by the act of the legislature of Minnesota; but that doctrine is not true in Ohio. In Ohio, as we have said, all stockholders must be made parties. That requirement is explicit and well fixed by the legislature of our state, and being a necessary thing to be done, a requirement in an action to enforce a stockholder's liability, does it follow that all stockholders who must be made parties must also be served, either by summons, or if nonresidents, by publication? The learned counsel for defendant, in his extended brief, asserts that the fact that the legislature has made it necessary in a proceeding to enforce a stockholder's liability that all stockholders shall be made parties, that therefore it follows, as the night the day, that the common law rule that the corporation represents the stockholders in an action of that character is abrogated.

It is a puzzling question to determine. We are almost unable to say whether Mr. Ham is correct in that statement. And he argues logically to sustain his proposition; and were it not for the case about which we are now speaking, and two other cases we find in the federal courts, we would be obliged and compelled to agree with Mr. Ham. But we find in this case of *Converse v. Hamilton*, *supra*, this doctrine laid down by the Supreme Court of our republic:

"Under this statute as interpreted by the Supreme Court of this state, as also by this court, the receiver is not an ordinary chancery receiver or arm of the court appointing him, but a quasi-assignee and representative of the creditors; and when the order levying the assessment is made, he becomes invested with the creditors' rights of action against the stockholders, and with full authority to enforce the same in any court of competent jurisdiction in the state or elsewhere." And numerous cases are cited.

And the court further say:

"The constitutional validity of chapter 272 has been sus-

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tained by the Supreme Court of the state, as also by this court, and this because, (1) the statute is but a reasonable regulation of the mode and means of enforcing the double liability assumed by those who become stockholders in a Minnesota corporation; (2) while the order levying the assessment is made conclusive, as against all stockholders, of all matters relating to the amount and propriety of the assessment and the necessity therefor, one against whom it is sought to be enforced is not precluded from showing that he is not a stockholder, or is not the holder of as many shares as is alleged, or has a claim against the corporation, which, in law or equity, he is entitled to set off against the assessment, or has any other defense personal to himself; and (3) while the order is made conclusive as against the stockholder, even although he may not have been a party to the suit in which it was made, and may not have been notified that an assessment was contemplated, this is not a tenable objection, for the order is not in the nature of a personal judgment against the stockholder, and as to him is amply sustained by the presence in that suit of the corporation, considering his relation to it and his contractual obligation in respect of its debts." And numerous cases are cited.

Now, as we say, if it were not for section 5 of the act of the Minnesota legislature which we have repeated, this case would seem to settle, beyond all peradventure, the case at bar, so far as the questions are concerned that arise upon this second ground of demurrer number one. But because of this Sec. five of the act of the Minnesota legislature, doing away with the necessity of making stockholders party to an action of this character, we are left in the dark, and the darkness grows thicker and blacker as we bring to memory the act of the legislature of our own state, in which stockholders are required to be made parties in actions to enforce this sort of liability.

We call counsel's attention to another celebrated case, the case of *Irvine v. Elliott*, 203 Fed. Rep. 82, decided in the U. S. District court of Delaware, February 24, 1913. In speaking of the same matter about which we spoke in *Converse v. Hamilton*, *supra*, this court says:

"The nonresident stockholders, including Elliott, were

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joined as defendants with the railroad company and resident stockholders, and constructively served by publication pursuant to the laws of Ohio. The domiciliary suit, so far as it related to the making of the assessment against nonresident stockholders not actually served with process nor appearing, was in the nature of a proceeding *in rem*, where service by publication is sufficient. *Shipman v. Treadwell*, 200 N. Y. 472 [93 N. E. Rep. 1104]. And in that suit such nonresident stockholders were represented by the company; and the decree ordering the assessment, while not binding them as a judgment or decree *in personam* rendered after personal service of process, was conclusive upon them as to the amount of the indebtedness or liability of the company, and the necessity of making an assessment upon the stock to the extent and in the amount set forth in such order and decree."

This was an action in which a stockholder's liability was fixed by the court of common pleas of Franklin county, in this state, and the receiver went to the state of Delaware to enforce that liability, that assessment against one of the stockholders, Elliott. And at the time of the determination of this question by the federal district court of Delaware, we had upon our statute books the same enactment of our legislature as we have now, that is, a requirement by legislative act that all stockholders be made parties; and in this suit, from the opinion of which I am now reading, publication was made on the foreign stockholders, so that the question of publication, whether good or bad, was not raised in this case of *Irvine v. Elliott, supra*, in the federal court of Delaware. But the court say, in the very teeth and forehead of the statutes of our state requiring stockholders to be made parties in actions to enforce a stockholder's liability, that the corporation in that case was the representative of all stockholders in spite of this requirement of our statutes. And so some little light is thrown upon the question as to whether or not it was necessary, in the Lucas common pleas, to have served the defendant Griffin, either constructively or actually.

And coming now, for the sake of economy of time, to close, we are of the opinion that it was not necessary in the case in

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Lucas county, to enforce the statutory liability against the stockholders of the Union Central Savings Bank Company, to summon the stockholders actually by process, or to obtain service by publication, for the reason, as the court say, as we say, that this defendant corporation, the Union Central Savings Bank Company, was the representative of all of the stockholders. This may seem strange to some of us, but we think we can see a ray of light, by which we may be guided safely to a determination of these questions: First, an action to enforce a stockholder's liability is one in chancery always in our court, but it is in the nature of an action *in rem* and not *in personam*. Second, when a person became a stockholder of a corporation under the old constitution creating this double liability, he entered into a contractual relation, as we have said, with all creditors of that corporation, to see to it that he would play his part in the matter of paying legal obligations that might be contracted and entered into by the corporation. Third, the courts speak of the thing called "assessment," the receiver is ordered to bring all creditors of the corporation into court, and to fix the extent of indebtedness of the insolvent corporation, and to determine what percentage shall be assessed against the stockholders. If they are stockholders under the old constitution, then the percentage of assessment might be 100 per cent upon their stock. Then, in the end, briefly stating, this assessment is made and levied by the receiver and reported to the court, and the same is confirmed, modified or changed as shall suit the pleasure of the court and the particular facts in the case. And this assessment, it seems, cannot be enforced as an ordinary judgment. If that were so, then why this action before this court? Why not an execution against the defendant Griffin and his property to collect the assessment? Nothing of that kind was done, nothing of that kind could be done and therefore we have this action pending here, founded upon the proceedings of the Lucas common pleas to obtain a decree, a finding by this court against Griffin of the amount of his assessment as fixed and levied by the receiver in that Lucas county action. Many other reasons might be given to distinguish that sort of an action as found in the Lucas common pleas to enforce the stockholder's liability from

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an action at law or an ordinary action in equity for that matter.

And so we hold that in spite of the record and the fact that no constructive service was ever made upon Griffin in the Lucas county case, and that no actual service was ever made upon him therein, and that he never entered his appearance in that case, yet that court had the inherent power to confirm an assessment, and to order and decree that Griffin pay, as a stockholder of the Union Central Savings Bank Company, the amount sought to be collected in this suit, and that such assessment, finding and decree of the said court is conclusive upon the defendant Griffin, as to the amount of the indebtedness of that insolvent corporation, and the amount and extent of the liability of the defendant Griffin, and the necessity of making an assessment upon the stock to the extent and in the amount set forth in the order as made by the Lucas common pleas.

Our first conclusion was that this second ground of the demurrer ought to be sustained, but in reading carefully and in rereading the answer and cross petition of the defendant Griffin, we have concluded, in spite of our conclusion on the principal point raised, that there is enough of substance in this answer and cross petition that raises a certain issue that ought to be submitted to the court.

In this answer and cross petition of the defendant Griffin is a general denial. After making certain admissions, a general denial of all of the other allegations of the plaintiff's petition comes in, and puts the plaintiff upon proof of any material matters that he may be required to sustain and prove in order to make out his case in this court.

But we also find in this answer and cross petition another allegation, on page 7, which is as follows:

"Your petitioner further charges that this court, on or about January 29, 1912, made a pretended finding in such cause to the effect that said George W. Griffin, whom the court erroneously misnamed a defendant, was the owner of five shares of stock in the Union Central Savings Bank Company" etc.

That is one of the allegations as found there. Then we have:

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"And said court made a pretended finding that said George W. Griffin was a nonresident of the state of Ohio, all of which findings, judgment and orders were false, null, void and without legal efficacy whatsoever as against your cross petitioner."

Further:

"That on or about May 29, 1912, said court made a pretended finding and order in said cause that said George W. Griffin should pay said pretended receiver said amount so as aforesaid attempted to be found due from him, and that he was the owner of five shares in said bank company, and that there was due from him said sum of \$608.91 and interest, and that said court in its pretended judgment of the 29th day of January, A. D. 1912, Cause No. 51779, being the Lucas county common pleas cause aforesaid, made a pretended finding and judgment that said George W. Griffin was duly served with process by publication according to law; and that all, each and every said pretended findings, judgments and orders were false, null and void, and without legal efficacy whatsoever as against this cross petitioner."

We think this part of the answer and cross petition, in substance, attacks this question: Was Griffin the owner of five shares of the capital stock of the Savings Bank Company? He says in his answer and cross petition that the Lucas common pleas found that he was the owner of these five shares, but he says that that finding is false, and to our mind, in substance, that part of the answer and cross petition of the defendant Griffin, does not put the plaintiff receiver upon proof of the fact that Griffin was the owner of these five shares of stock, but it gives Griffin the right to prove and show, if he can, to this court, that he was not the owner of these five shares of stock, because that is one of the defenses that may be made to an action of this kind, in spite of all the holdings of the federal courts, as well as the state courts.

And we are of the opinion that if we should sustain this second ground of demurrer number one, we would commit an error, and that this case would go to an appellate court upon a frivolous proposition only, and would eventually come back here for a rehearing and trial upon its merits. So we say that

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in an action of this kind, the defendant Griffin, if his pleading warrants it, is permitted to furnish proof to the court as a defense to this action to enforce his stockholder's liability, first, that he was not a stockholder in the Savings Bank Company; second, that he did not own, at any time, and never was the owner at any time, of five shares or any part of five shares of the capital stock of the defunct banking company.

There is one more ground upon which a litigant may be permitted to defend, but that is not raised by this answer and cross petition, and that is this: In an action of this kind, where it is sought to enforce a liability of this character against a stockholder in a defunct or insolvent corporation, he may be permitted to interpose against his statutory liability any lawful or legal claims that he may have against the corporation, and have the court recognize them and set them off as against his stockholder's liability; but that ground is not raised by the pleadings in this case. Therefore we are of the opinion, but this opinion is somewhat enclouded with doubt, that the second ground of demurrer number two should be overruled, and the same is overruled, and the defendant Griffin is given until the fourth Saturday in July to plead further, if he so desires.

MASTER AND SERVANT.

[Franklin Common Pleas, March 11, 1913.]

CHARLES P. BROWN v. JEFFREY MANUFACTURING CO.

1. **Employer's Liability Insurance Act does not Impose Liability on Employer for Wanton Assault on one Employee by Another Outside Course of Employment.**

An employer's liability, both at common law and under act 102 O. L. 524, 529 (Gen. Code 1465-60), is limited to injuries sustained by an employee while in the course of employment resulting from the fault of the employer or his agent acting within the scope of his official duties; to impose a liability upon an employer for the wanton and malicious acts of one employee to another, outside the course of employment and not within the scope of employment duties, merely because of the fact of employment of both, would be a taking of property and obnoxious to the constitutional guarantee.

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2. Course of Employment Applies to Employee Committing Injury and Injured Employee.

The "course of employment" for injuries to an employee in which an employer is liable under Gen. Code 1465-60, applies as well to the employee committing the injury as to the employee injured.

[Syllabus approved by the court.]

DEMURRER to petition.

Hugh Huntington, for plaintiff.

Arnold & Game, for defendant:

Cited and commented upon by the following authorities: *State v. Creamer*, 85 Ohio St. 349 [97 N. E. Rep. 602; 39 L. R. A. (N. S.) 694]; *Ives v. Railway*, 201 N. Y. 271 [94 N. E. Rep. 431; 34 L. R. A. (N. S.) 162; Ann. Cas. 1912 B. 156].

BIGGER, J.

In my opinion the petition is demurrable.

If the construction contended for by plaintiff's counsel is to be put upon this provision of the statute, I think it would be clearly in violation of Art. 19, of the bill of rights which provides that private property shall ever be held inviolate but subservient to the public welfare. It is not averred in the petition that the defendant was guilty of any wrong or neglect or default whatever, but the right to hold the defendant liable in damages is claimed by virtue of the language of the act of May 31, 1911, 102 O. L. 524, 529 (Gen. Code 1465-60), which act was decided by the Supreme Court to be constitutional, *State v. Creamer*, 85 Ohio St. 349 [97 N. E. Rep. 602; 39 L. R. A. 694]. The point here raised, however, was not raised or discussed by counsel in that case, and was not considered by the court in so far as the scope of the consideration of the act by the court is disclosed by the opinion in the case. On the contrary, counsel representing the relator say in their brief at page 355:

"It clearly appears that there is no attempt here to create a liability without fault as in the New York statute," etc.

The common law, and the law of this state as it existed before the passage of this act, did not recognize a liability of the

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master, except for his own fault or wrong and for the wrongs committed by his agents while acting within the scope of their agency, which wrongs are attributed to him. It was never the law that an employer was liable for torts committed by his agent and servant outside the scope of his employment. He was liable for the torts of his agents and servants committed within the scope of their employment. This principle of liability rests upon principles of justice and equity, and upon the principle that the employer controls the acts of his servant which are within the scope of his employment and reasonably and justly holds him liable for the wrongful acts of his agent done while carrying out the thing committed to his care. But the rule ceases where its reason ceases to exist, and for the wanton and malicious acts of the servant or agent outside the scope of his employment the master was never held liable. But upon what principle of right or justice can a man's property be taken by law and given to another when he is guilty of no fault or neglect whatever, and when the wrongful act was not done within the scope of the employment of his agent or servant? Private property can not be taken by law for private use, but only for public use, when the public welfare demands it. It is not apparent that the public welfare is to be subserved by holding a person liable in damages, if one man wantonly assaults and injures another, merely for the reason that he happens to employ both of them. It would certainly be somewhat of a surprise to the profession generally to learn that under the statute, when one of two employees murders the other while that other is engaged at his employment, that the employer is liable in damages for his death, merely because he also employs the murderer. In my opinion, to give the statute this construction, would be to render it obnoxious to the guaranty of the constitution of the inviolability of private property. Nor did the Supreme Court give it the construction contended for. On the contrary, Judge Johnson says, at page 405, speaking of this act:

"It creates no new right or new remedy for wrong done."

The contention of counsel is that it does create a new right, one that did not exist either at common law or by statute, to wit, that an employer without wrong or default on his part shall be

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compelled to make compensation to one employee who is injured by another's wilful act not in the scope of his employment, but entirely without the scope of his employment. If this act creates no new right, as Judge Johnson says, then it clearly does not give a right of action to the plaintiff upon the facts stated.

Again it is said on page 392:

"So that an employer who elects not to come into the plan of insurance may still escape liability, if he is not guilty of wrongful act, neglect or default."

It is plain from the opinion of Judge Johnson that the Supreme Court construed this act as simply affecting the defenses which might be made in the cases provided for therein and not that it conferred rights of action against an employer which did not before exist and indeed this is the plain statement of Judge Johnson as I have pointed out.

In my opinion, the language "in the course of employment" is to be applied as well to the person injured as to the one committing the injury. In construing an act, all of its different provisions are to be construed together. That this language applies as well to the person committing the injury as to the one injured seems to be very strongly reinforced by a consideration of the provisions of Sec. 21-2 of the act which provides that in the case of injury arising from the wilful act of an employer or his officers or agents to any employe in the course of employment and the employer has paid into the state insurance fund the premium provided for by the act, that it is optional for the injured employee to take under the provisions of the act or to institute a proceeding in the courts to recover his damages. In such case this act is not applicable and it is not to be supposed that the legislature was ignorant of the fact that for wanton and wilful torts of an agent, the master is not liable except when the tort is committed within the course of his employment. The fact that the legislature, therefore, provided that for the wilful torts of an agent the injured employee might either take under the statute or sue to recover his damages at law shows that the legislature meant that it was only for wilful torts committed in the course of the employment that it was legislating about and not for a class of cases where there was no liability of law and for

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which injuries the injured employee could not maintain an action at law against the employer.

In the light of the above considerations I am led to the conclusion that the petition does not state facts which entitle the plaintiff to any relief, and the demurrer is sustained. The only right of action in such case is against the person who was the cause of the injury.

COSTS AND FEES—PARTITION—SHERIFFS.

[Franklin Common Pleas, May 19, 1913.]

RUGGLES V. BINGHAM, ET AL.

Sheriff not Entitled to Poundage on Partition Sale when Purchase Money and Notes are not Paid to Him but to the Heirs.

Under Gen. Code 2845, as amended 102 O. L. 285, a sheriff is not entitled to poundage on sales in partition except on money "coming into his hands"; hence, on sale in partition, if purchasers other than the heirs, pay the purchase money direct to the heirs, giving notes to them and secure payment thereof by mortgage upon the land sold, paying no money to the sheriff, he is not entitled to any poundage.

[Syllabus approved by the court.]

MOTION to retax costs.

This action is one in partition, in which the purchasers, other than the heirs, paid the heirs, direct, at request of counsel for plaintiff, the purchase money and notes securing payment by mortgage upon the property purchased.

The attorney for plaintiff paid the costs of court and did not permit the money to be paid into the sheriff's office. The sheriff demanded his poundage, asserting that he was entitled thereto whether the money was paid through his office or not. This was contested on motion by plaintiff to retax the costs.

F. S. Monnett, for plaintiff.

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Huggins, Huggins & Hoover, John H. Summers and T. H. Brown, for defendants.

BIGGER, J.

In my opinion the sheriff is only entitled to poundage on the amount of money actually paid into his hands. Judge Crew in the case of *Major v. Coal Co.*, 76 Ohio St. 200, 209 [81 N. E. Rep. 240], speaking of the purpose for which poundage is allowed, says it is allowed "as a compensation to the sheriff for the risk incurred in handling and disbursing money actually received by him in his official capacity."

The statute relating to the compensation of sheriffs was amended by an act passed May 31, 1911, 102 O. L. 277. This act repealed Gen. Code 2845. Gen. Code 2845 prior to its repeal and amendment by the act of May 31, 1911, on the subject of poundage provided as follows:

"Poundage on all moneys actually made and paid to the sheriff on execution, decree or sale of real estate, except on writs for the sale of real estate in partition, 1 1-2 per cent on the first thousand dollars, and 1 per cent on all sums over one thousand dollars; but when such real estate is bid off and purchased by a party entitled to a part of the proceeds, the sheriff shall not be entitled to any poundage, except on the amount over and above the claim of such party; * * * Selling real estate under an order of the court in partition, three-fourths of 1 per cent where the amount of sales does not exceed two thousand dollars, and one-fourth of 1 per cent on the amount over and above that sum."

It will be observed that a somewhat radical change was made by the amendment of the statute. Prior to the amendment the sheriff's fees for selling real estate on an order of the court in partition was not poundage at all. It was expressly excepted from the provisions of the statute relating to poundage under the statute as it stood before amendment. The sheriff was given a small amount as compensation for making the sale. That provision was eliminated by the amendment and the sheriff is now allowed poundage only for making such sales and the object and purpose of allowing poundage must have been within the legisla-

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tive contemplation in making the change, *i. e.*, compensation for the risk incurred in handling and disbursing money. That risk is, of course, not incurred if the sheriff is not called upon to handle and disburse the money. The language of the statute as it now stands provides that the sheriff shall be allowed the percentage therein provided on money "coming into his hands." This was not the provision of the statute before amendment. Under the statute as it stood before amendment, he was allowed the amount therein provided for making the sale, and it did not depend upon the money coming into his hands. The court can not disregard this change in the statute, but must give it effect. I think the language, "coming into his hands," is the same in effect as the language "actually made and paid" applying to other sales than those in partition. In the statute as amended in my opinion the exception has reference to the amount to be paid the sheriff which is different in sales in partition from other judicial sales.

There is nothing to prevent parties doing what they did in this case, and if the parties have given their receipts for the payment of the money the sheriff in my opinion should receive them in lieu of the receipt in disbursement of the money and that he is only entitled to poundage on the actual amount of money coming into his hands.

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BANKRUPTCY—MECHANICS' LIENS—SCHOOLS.

[Hamilton Common Pleas, 1913.]

PITTSBURGH PLATE GLASS CO. v. MICHAEL J. HEINTZ, ET AL.

1. Board of Education Paying Principal Contractor Before Completion of Contract Money to be Retained until Acceptance is Liable to Subcontractors and Material Men.

Where the board of education of the city of Cincinnati paid a principal contractor money retained under its contract with him until the completion and acceptance of the building before such completion and acceptance, such board is liable under Gen. Code 8335 (formerly R. S. 3204) to subcontractors and material men to the extent of such payments where such payments had the effect of diminishing the fund for the payment of such subcontractors and material men. *Niemer v. Close*, 22 Dec. 592 (12 N. S. 217), followed.

2. Subcontractors Receiving Part of Retention Fund Postponed to Payment of Subcontractors not Sharing Therein.

Subcontractors and material men, however, who received some of this fund will be postponed to other contractors and material men who did not share in such payments for the reason that the fund as to those receiving the same was not diminished within the meaning of Gen. Code 8335.

3. Payments to Contractor upon Estimates of Work Completed not Considered Fund for Benefit of Subcontractors.

Where payments are made by the owner as the work progressed upon estimates by the superintendent of buildings, as provided for by the contract, in the absence of proof of actual fraud or collusion on the part of the owner in the making of such payments, such payments will not be considered a fund for the benefit of the subcontractors and material men under Gen. Code 8335, for the reason that such fund must be in the nature of an indebtedness due by the owner to the principal contractor.

4. Subcontractor's Lien not Released by Discharge in Bankruptcy of Contractor.

The fact that the principal contractor received his discharge in a court of bankruptcy does not release the owner from responding to the extent of the funds fraudulently or collusively paid out. The federal bankruptcy law expressly upholds liens given under the state law.

5. Subcontractors Filing Liens in Bankruptcy Proceeding against Contractor not Precluded from Sharing in Reserved Fund.

Where subcontractors have filed proof of unsecured claims in the court of bankruptcy, but have received no dividends and have expressed intention of filing amended proofs of claim setting up their security, they will not be denied the right to share in the reserved fund.

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6. Lien Allowed Subcontractor for Material under Special Contract after Contractor Abandoned Contract and Plans Changed.

A lien will be allowed to a subcontractor who prepared material under a special contract, where the owner, after the abandonment of the contract by the principal contractor, changed the plans under which the subcontractor was working, although such material was not used in the construction of the building.

[Syllabus by the court.]

Morse, Tuttle & Ross, Otto Pfleger, Worthington & Strong, Burch, Peters & Connolly, Cohen, Mack & Hurtig, Dolle, Taylor & O'Donnell, C. M. Leslie, J. J. Muir, Waite & Schindel, J. E. Fitzpatrick, C. A. J. Walker and Stephens, Lincoln & Stephens, for lien holders.

Oliver S. Bryant, for board of education.

MAY, J.

In 1906, the board of education of the school district of Cincinnati entered into a contract with Michael J. Heintz, for the erection of the Avondale school building, on the lot at the northwest corner of Rockdale Avenue and Reading Road. The contract price was \$186,267. According to the terms of the contract, the board of education was to retain 20 per cent of the contract price until the work was fully completed and accepted, and as the work progressed the superintendent of buildings was to make estimates of the same and the amount appropriated thereon by the board was to be paid, less 20 per cent, which was to be reserved in accordance with the previous provisions of the contract. Heintz began the work and in the fulfillment of the contract it was necessary for him to employ subcontractors and purchase materials, of which the board of education had knowledge. During the progress of the work, at various times between May, 1906, and October 28, 1907, the board of education, upon estimates approved by the superintendent of buildings, made payments to Heintz. There were twenty-four such payments, the total amount of which was approximately \$149,000. On October 28, 1907, a voucher of \$8000 was approved, which included the net estimate No. 24, \$1028.60, and an allowance for retained percentages amounting to \$6971.40. The total amount

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of retained percentages paid to Heintz was \$7177.40. This payment was made on November 9, 1907, although at this date the building was neither completed nor accepted as provided for by the contract. Heintz, on December 9, 1907, abandoned the contract and the board of education, under the provisions of the contract, took charge of the work and completed the building at an additional cost of \$23,101.59. After the completion of the building, the board had in its possession \$7685.90, as a balance due Heintz under the contract. Immediately after the abandonment of the contract by Heintz, and within four months as required by the statute, the various subcontractors and material men perfected their liens in accordance with the statutory provisions. This action is brought by one of the lien holders, the Pittsburgh Plate Glass Company, against Michael J. Heintz, the board of education, and all the other lien holders are made defendants, and all of them have filed answers and cross petitions.

Some time after the abandonment of the contract by Heintz, he was adjudicated a bankrupt in the United States District Court at Cleveland, Ohio, and three of the lien holders, to wit:

The Stone Lumber Company, Stewart Iron Works Company, and the Bollmann Wilson Foundry Company, filed proofs of debt as unsecured creditors, but no dividends have been declared in such proceedings and none, if declared, were collected by such defendants. But Heintz himself received his discharge in said proceedings and has since died.

The plaintiff in this case, as well as the defendants and cross petitioners, with the exception of the board of education, claim that the board of education should have in its possession as a fund payable to Heintz under the contract the sum of approximately \$33,153.49, which amount is arrived at by including the balance on hand admitted by the board of education, to wit: \$7685.90, the amount of the retained percentages paid out on November 9, 1907, under voucher 24, to wit: \$7177.40, and a balance which it is claimed was paid out in excess on the previous twenty-three estimates made by the superintendent of buildings as the work progressed.

The board of education, in its third amended answer and cross petition, admits the contract and the abandonment and

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sets forth the completion of the work, the bankruptcy and discharge of Heintz, and admits that it has on hand a balance of \$7685.90, due Heintz, which it offers to pay into court to pay such lien holders as may be found to have a valid lien. As to the payment of the retained percentages on November 9, 1907, the board alleges that these were made in good faith to enable Heintz to go on with the work and that all of the money was paid to certain subcontractors, and as to the payments made before October 28, 1907, the board claims that they were made during the progress of the work upon estimates made by the superintendent of buildings as provided by the contract, that all of these payments were made for work actually performed and without any fraud or collusion of the board, and the board finally denies all liability except as to \$7685.90, the admitted balance in its hands.

By agreement of parties, a jury was waived and the case tried to the court. A voluminous stipulation, consisting of twenty-four pages, was filed in the case by virtue of which the amounts due the various lien holders is admitted and also that said claims were properly filed in accordance with the statutory provisions. By consent of all parties it was likewise agreed that the several replies that were filed to the second amended answer and cross petition of the board should be considered as filed to the third amended answer and cross petition of the board of education.

Of the many questions raised by the third amended answer and cross petition of the board of education, all but two can be easily disposed of.

In answer to the board's contention that because some of the defendants, to wit: The Stone Lumber Company, the Stewart Iron Works Company, and the Bollmann Wilson Foundry Company, filed proofs of claim as unsecured creditors of Heintz, with the referee in bankruptcy at Cleveland, Ohio, they must be considered to have waived their mechanic's lien security, it is sufficient to state, not only have no dividends been collected by these answering defendants, but that each of them have stated since the hearing that amended proofs would be filed setting out the security claimed by way of lien. Inas-

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much as such a course would save their rights to a lien in the bankruptcy court, it necessarily follows that their right to a lien will be preserved by a state court. In support of the right to file amended proofs of claim in bankruptcy proceedings, see *Fisk, In re*, 185 Fed. Rep. 974; *Myers, In re*, 99 Fed. Rep. 691; *Falls City Shirt Mfg. Co., In re*, 98 Fed. Rep. 592; Loveland, Bankruptcy Sec. 341.

Neither can the board's contention that the lien holders' right to a lien on any funds in its hands fails because Heintz received his discharge in bankruptcy be upheld. Only one case is cited in support of this rather novel proposition. *Pike Lumber Co. v. Mitchell*, 132 Ga. 675 [64 S. E. Rep. 998; 26 L. R. A. (N. S.) 409]. That was an action to foreclose in equity a lien against the owner's property on default of the contractor who had been adjudged a bankrupt and who had received his discharge. The Georgia Supreme Court held that as the statute required as a condition precedent to the foreclosure of a lien a personal judgment against the contractor and that as this was impossible because of his discharge in bankruptcy no action would lie.

Under the Ohio statutes no such personal judgment is required and besides it is not sought here to reach the property of the principal owner, the board of education. In fact, a lien upon the owner's property is prohibited. *Palmer v. Tingle*, 55 Ohio St. 423, 425 [45 N. E. Rep. 313]. The relief sought is a lien on the funds belonging to Heintz, which, it is claimed, should be in the possession of the board. Such lien, valid under the state law, is expressly preserved by the terms of the National Bankruptcy law. Collier, Bankruptcy (9 ed.) 444, 445.

It is likewise claimed by the board that the Stewart Iron Works Company has no lien. The company's claim is for \$1387.50, which is made up of two items, one for \$637.50, for the amount of material furnished, and the balance, \$750, is for damages sustained when the board, after the abandonment of the contract by Heintz, changed the plans of the work being done by the Stewart Iron Works Company. The Stewart Iron Works Company was a subcontractor for the iron fence to be placed around the premises. The work on this fence was being done

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at the factory of the company and was to be placed on the premises after the completion of the contract. The company had no knowledge of the abandonment of the contract by Heintz and continued to prepare the fence until June 15, 1908, when it was notified by the board of the change of plans. Up to this date the admitted value of the actual cost to the Stewart Iron Works Company of so much of the fence and parts thereof as was made up and especially prepared at the time of the change of the contract was \$637.50. The fence was not completed, nor was any part of it delivered upon the premises. The proper notice was given by the Iron Works Company and its lien was perfected within four months from June 15, 1908, the date of furnishing of the last material. It is now claimed that because no material was placed upon the premises there can be no lien and also that there can be no lien for unliquidated damages sustained by change of plans. As to this latter item the objection is well taken. The statutes provide for no such lien and none will be allowed. As to the \$637.50, the value of the material furnished, the lien will be upheld. The statutes providing for a subcontractor's lien are to be liberally construed. *Bullock v. Horn*, 44 Ohio St. 420 [7 N. E. Rep. 737].

Under Gen. Code 8324 (R. S. 3193) any subcontractor, material man, etc., who has performed labor or furnished material for the construction, alteration, etc., of a public building, provided for in a contract between the owner or any board, is entitled to a lien if he complies with certain provisions.

It is admitted that the work on the fence was being done and that the Iron Works Company performed the labor and furnished the material, and without fault on its part the board did not use this material. It was prepared under a special contract and to the extent of the value of the material furnished and the labor performed the lien must be allowed.

In *Beckel v. Petticrew*, 6 Ohio St. 247, our Supreme Court held:

"The lien authorized by the 'act to create a lien in favor of mechanics and others, in certain cases' will extend to all the materials, in good faith furnished, for the purpose of erecting or repairing a house in pursuance of an agreement with the owner,

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notwithstanding a portion of such materials may subsequently be otherwise appropriated without the consent of the party furnishing them."

In *Trammell v. Mount*, 68 Tex. 210 [4 S. W. Rep. 377; 2 Am. St. Rep. 479], it was held that after material is prepared for the building though not delivered on the ground, this will not defeat a lien if the owner refuses to receive it. The court said:

"To furnish material for the construction of a house, and to furnish materials which enter into the construction, are very different things."

See also *Howes v. Wire Works*, 46 Minn. 44 [48 N. W. Rep. 448]; *Hinchman v. Graham*, 2 Serg. & R. (Pa.) 170; *Berger v. Turnblad*, 98 Minn. 163 [107 N. W. Rep. 543; 116 Am. St. Rep. 373]; and an exhaustive note appended to the case of *Pittsburg Plate Glass Co. v. Leary*, 25 S. D. 256 [126 N. W. Rep. 271; 31 L. R. A. (N. S.) 746], a summary of the annotator at page 758; Phillips, *Mechanics' Liens*, pp. 62, 259, 260, 261.

Of course, the board is entitled to the fence now in possession of the Iron Works Company and it can dispose of this for what it can receive and thus recoup itself to some extent.

There is likewise no merit in the board's contention that some of the defendant lien holders by way of cross petition did not claim under Gen. Code 8335 (R. S. 3204). The replies of such defendants, however, filed to the second amended answer of the board, and which by stipulation of counsel are to be considered replies to the third amended answer and cross petition, expressly set up their claims under this section of the statutes, and the trial of the case proceeded on the theory that all of the defendants were claiming under Gen. Code 8335, and even if the replies, which are not a departure, do not raise this issue, the court will permit an amendment of these cross petitions before judgment to conform to the proof.

This brings me to the two most important defenses set up by the board of education. The board claims that when it paid to Heintz on November 9, 1907, a sum which included \$7177.40, retained percentages, in pursuance of estimate No. 24, approved

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October 28, 1907, although the building at that time was not completed and had not been accepted as provided by the contract, there is no liability for two reasons: (1) such payments in advance must be by fraud or collusion, and neither is shown; and (2) because the amount so paid was actually paid to some of the defendant lien holders.

In 1907, at the time this payment was made, Rev. Stat. 3204 (now Gen. Code 8335) was in force. It read:

“If by collusion or fraud the owner, board, officer or authorized clerk or agent thereof, pay in advance of payments due under the contract and thereby diminish the amount of the funds for such laborer, mechanic, subcontractor or material man, he shall be liable to the amount that would have been due at the filing of the account in the same manner as if no such payment had been made.”

The undisputed evidence as to this payment of \$7177.40 shows that it was made on November 9, 1907; that at the time the building had neither been completed or accepted as provided by the contract between the board and Heintz, but no actual fraud or collusion is shown. Of this amount there was paid to Moores-Coney Company, \$1500.00; Great Western Marble Company, \$1500.00; Dayton Lumber & Manufacturing Co., \$1000.00; E. H. Morgan & Company, \$1000.00; Pittsburgh Plate Glass Co., \$210.00; J. B. Schroeder & Co., \$200.00; W. E. Greyble, \$225.00; McArthur Brick Company, \$450.00. The balance was paid to M. J. Heintz, to the order of pay roll, amounting to \$1152.75, and a check to Heintz personally.

Revised Statutes 3204 (now Gen. Code 8335), in force in 1907, differed from the statute in force at the time of the decision in *Bullock v. Horn*, *supra*. At that time the words “but any such payments made in good faith to said contractor or others in order to complete the contract in accordance with the original contract shall not be held to be fraudulent or collusive,” were in the statute. These words were omitted by the amendment passed March 5, 1887, 84 O. L. 51.

So that, irrespective of the purpose of the payments, if they were made in disregard of the provisions of the contract between

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the board and Heintz, and the effect was to diminish the amount of the fund for the laborer, mechanic, subcontractor and material man, the board is liable for the amount of such payments which were made to the principal contractor before the completion and acceptance of the work with the knowledge that there were subcontractors and material men and such payments are held to have been made fraudulently and collusively. This is the holding of the Supreme Court in *Herrmann v. Niemes*, 85 Ohio St. 444, affirming, *no op.*, *Niemes v. Close*, 22 Dec. 592 (12 N. S. 217).

But it is claimed that of this payment a large amount found its way into the hands of certain lien holders. As to such lien holders, of course, such payments in advance did not have the effect to diminish the fund for their payment, but the fund was undoubtedly diminished as to other lien holders and the board of education is liable to such other lien holders as did not participate in that payment in advance, and in the decree to be entered in accordance with this finding such lien holders as participated in that fund will be postponed to those lien holders who had no benefit therefrom. That lien holders who have received payments made to the contractor in advance of the contract should not hold the owner is now expressly provided for by a recent enactment of the legislature passed April 16, 1913, and approved by the governor May 2 of this year. Under Sec. 4 of this act, which repeals the old sections of the statute, it is provided:

"And no payment made to any contractor before the expiration of said sixty days shall defeat any lien of any subcontractor, material man or laborer, unless such payment has been distributed among the subcontractors, material men, or laborers, or if distributed in part only, then to the extent of such distribution."

As to those who did not share in the fund, under the decision cited above, the payment in advance was fraudulent and collusive.

There remains the question as to the effect of the payments made as the work progressed upon estimates approved by the superintendent of buildings. The contract contained the following provision:

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"As the work progresses the superintendent of buildings shall make estimates of the same to be presented to the board of education at each bill day of the same, and the amount appropriated thereon shall be paid by the board within five days after its appropriation by the same, twenty per cent being first reserved as heretofore agreed."

The evidence shows that the contract price was \$186,267; that there was paid to Heintz upon estimates so made by the superintendent of buildings \$149,028.60; that there was retained by the board 20 per cent, or in the neighborhood of \$38,000; that it required \$23,101.49 to complete the contract. The subcontractors and material men claim that "the estimates on which said payments were made were in excess of the amount and value of the work done at the times of such estimates and the resulting increases in the payments made thereon were as to these defendants fraudulent and collusive."

The only evidence on this point is the contract price and the amount paid under the estimates and the testimony of the superintendent of buildings. His testimony shows that from time to time as the work progressed he made estimates on the work actually done and materials furnished by calculating the amount of the work and cost of the materials at the then market price of material and labor; that he never took into consideration what the proportion of the work done at the time of the estimate was in comparison to the work to be done under the whole contract. He merely estimated the value of the particular work done at the time of each estimate. For example, at the end of the seventeenth estimate \$155,000 of the work was completed and he made no effort to ascertain how much of the work remained to be completed. As a matter of fact, after the twenty-fourth estimate, which was paid November 9, 1907, under the estimate made October 28, 1907, the total of all the estimates made was \$186,028.60, or within \$238.40 of the contract price. The contract was then abandoned and the board was required to expend \$23,101.49 to complete the work according to the contract. The subcontractors and material men therefore contend that at the time of the abandonment of the contract there had been completed under the contract only about \$163,000 of the

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work and that therefore the board should have only paid out about \$130,535, instead of \$149,028.60, and that therefore the board should have had on hand to complete the contract \$55,734.59, instead of about \$37,964.48, and that all the payments in excess of 80 per cent of the work done in proportion to the entire cost should, under Gen. Code 8335, be held to be in the possession of the board and be considered a fund with which to pay the subcontractors and material men.

There is no proof of actual fraud or collusion; neither is there any proof that the work and material paid for under the estimates was not actually done or furnished.

Under the Ohio decisions, *Bullock v. Horn, supra*; *Stark v. Simmons, supra*, and *Niemes v. Close, supra*, it is settled that the material men and subcontractors are presumed to have notice of the terms of the original contract and to have accepted employment and furnished material with the implied assent to such terms.

Under Heintz's contract it was expressly provided that the board of education should have the right to reserve 20 per cent of all estimates made by the superintendent of material furnished and labor performed under the contract, to be paid upon the completion and final acceptance of the building, and further that as the work progresses the superintendent of buildings shall make estimates of the same to be presented to the board and the amount shall be paid, 20 per cent being reserved as heretofore agreed.

What then is the proper construction to be placed upon the contract and the statute. If the contract had provided that payments should be made only in the proportion that the amount of work completed bore to the whole work to be done, then any payments in excess of such proportions would necessarily have diminished the fund out of which subcontractors and material men were to be paid and such excess payments under the Ohio cases would have been fraudulent and collusive and the board would be liable to the extent of such excess payments. But, where neither the statute nor the contract contained an express provision requiring estimates to be made in that manner, and in the absence of proof that such payments were fraudulently and

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collusively made, it cannot be held as a matter of law that payments actually made on estimates based on the market price of labor performed and material furnished without regard to the contract price are fraudulent and collusive as to subcontractors and material men, under R. S. 3204 (now Gen. Code 8335).

Unless the payments were made in violation of the contract provisions from a fund actually owing from the owner to the contractor at the time of the payment, such payments are neither fraudulent nor collusive under this section.

In *Bullock v. Horn*, *supra*, the Supreme Court said at page 425:

"The purpose of laws of this character is, as stated by Phillips in his work on Mechanic's Liens, 'to take from the owner money actually owing by him upon his contract and apply it in payment for the labor and material which the workmen and material men have contributed toward the performance of the same contract.' * * * And such provisions (statutory) operate as an equitable transfer to the workmen and material men of the money due to the contractor by the owner subject only to such obligations as spring out of the contract itself."

And, in *Stark v. Simmons*, 54 Ohio St. 435, 438, the court said:

"The statute (R. S. 3204) preserves the amount of the indebtedness of the owner to the contractor, as a fund for the satisfaction of the claims of those who take liens in accordance with its provisions; but it does not, for the purpose of creating a fund to which they may resort, enlarge the owner's liability to the contractor as it may be fixed by the terms of the contract and by the rules of law relating to the subject."

Surely, it cannot be said that where payments were made in excess of the proportionate amount due, but for work performed and materials furnished, that there is any indebtedness due to the contractor, or that these payments were made fraudulently and collusively in advance of payments due under the contract. After the last payment so made, if the full contract price had been paid, and the building was not yet completed, the contractor could be required to finish his contract without further payments. If he refused, the owner could complete the

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contract and recoup itself out of any funds in its possession under the retained percentage clause, or, if none such had been provided for, could recover from the contractor himself.

I have not cited in this opinion cases from other states upon the proper construction to be given to Gen. Code 8335. I have, however, examined a great many of these authorities and the general principle as laid down in the Ohio cases seems to be the universal rule in nearly all the states which have mechanics' lien laws. Some of the leading cases are: *Simonson Bros. Mfg. Co. v. Bank*, 105 Iowa 264 [74 N. W. Rep. 905]; *Othmer v. Clifton*, 69 Iowa 656 [29 N. W. Rep. 767]; *Epeneter v. Montgomery Co.* 98 Iowa 159 [67 N. W. Rep. 93]; *Walsh v. McMenomy*, 74 Cal. 356 [16 Pac. Rep. 17]; *Rockel*, Mechanics' Liens Secs. 67, 68, 69 and 70, and cases cited.

There remain a few questions of detail to be passed upon. Most of the amount paid by the city to complete the contract, to wit: \$23,101.59, according to the stipulation, is a proper amount. The other items which were disputed at the hearing, I am of the opinion should be allowed. I am also of the opinion that of the \$8000 voucher paid on November 9, 1907, to Heintz direct, either for labor or personally, should be disallowed and should be considered as a part of the fund in the hands of the board for the benefit of the subcontractors and material men.

I have come to this conclusion reluctantly because the evidence shows most careless and gross negligence on the part of the superintendent of buildings. Nevertheless, I cannot find that such carelessness and gross negligence in the manner of making the estimates amounts to the fraud or collusion required under Gen. Code 8335 as interpreted by our Supreme Court. The payments, of course, out of the retained percentages, as above discussed, made before the completion and acceptance of the building, were fraudulent or collusive. It seems to me that the board of education of the city of Cincinnati would be much better off if, instead of allowing a superintendent of buildings who has many and divers duties to act as a supervising architect, it would in the future employ a supervising architect in the construction of its buildings.

A decree may be prepared in accordance with this opinion.

Superior Court of Cincinnati.

MUNICIPAL CORPORATIONS—STREET RAILWAYS.

[Superior Court of Cincinnati, May 7, 1912.]

DAVID L. CARPENTER V. CINCINNATI TRACTION CO. ET AL.*DAVID L. CARPENTER, A TAXPAYER, V. CINCINNATI (CITY) ET AL.****1. Circumstances Under Which Courts of Equity May Interfere with Administrative Municipal Government.**

Courts of equity will not interfere with municipal corporations in their internal police and administrative government, unless they are transcending their powers, or some clear right has been withheld or wrong perpetrated or threatened, which must be proved by the petitioner by a preponderance of issuable facts, upon which the court can base its judgment, irrespective of the motives of members of council.

2. Exercise of Municipal Power for Purpose of Effecting by Indirection Purpose Different from that Expressed Invalid.

A municipal council possesses only such powers as are delegated to it by the state, which powers must be exercised in good faith for the accomplishment of the object for which the power is delegated, and not colorably for such a purpose in order to accomplish another object for which the power is denied to it by the state.

3. Ordinance Changing Name of Street to Evade Statutory Consents for Construction of Street Railway, Invalid.

Ordinances passed by council, ostensibly in the exercise of a power to change the names of streets, given by Gen. Code 3725 et seq., but really for the purpose of nullifying the law of the state, Gen. Code 9105, forbidding the grant of a railway franchise unless certain conditions are complied with, are invalid.

4. Street Railway Franchise Ordinance Bartering Away State's Police Law, Invalid.

An ordinance, granting a street railway franchise, bartering away the state's police power, as well as the right of future councils to legislate upon topics relating to the safety and well-being of the public is invalid.

[Syllabus by the court]

INJUNCTION.

*Frederick Hertenstein and Dinsmore & Shohl, for plaintiffs.**Alfred Bettman, city solicitor, for Cincinnati.*

*Affirmed, no op., Cincinnati Trac. Co. v. Carpenter, 88 O. S. 000; 58 Bull. 391.

Carpenter v. Traction Co.

Joseph Wilby and George H. Warrington, for traction and street railway companies.

SPIEGEL, J.

These two cases were tried jointly to the court, and from the evidence submitted on the trial the following state of facts has developed: The plaintiffs in case No. 55091 are owners of property abutting on Reading road, between Clinton Springs avenue and Paddack road. During the summer of 1911, the inhabitants of Bond Hill located at the end of Paddack road, and recently annexed to Cincinnati, resumed their endeavors to obtain street car service to Cincinnati, organizing a Bond Hill Welfare Association for that purpose. The latter communicated with the traction company, which declared its willingness to extend its Avondale line by single track to a point just south of the crossings of the N. & W. and B. & O. Railway, but not to Bond Hill proper, provided the Bond Hill Welfare Association would secure the necessary consents for the construction of said extension, as well as secure the passage of the necessary ordinances granting this extension, with the proviso, that the traction company should be exempt from the payment of any part of the cost whatsoever for the elimination of the grade crossings referred to, or any expense whatsoever for the privilege of operating over the roadway, either over or under the railroads. The traction company stated very frankly to the Bond Hill Welfare Association that it had not been desirous of extending its line to Bond Hill, because investigations made showed no possible adequate return from the construction of an extension, and the cost of building a double track extension precluded any possibility of netting an adequate return on the investment.

At a mass meeting of the Welfare Association of Bond Hill, held September 8, 1911, this proposal of the traction company was unanimously adopted. In accordance with Gen. Code 9105, prohibiting council from granting a street railway franchise until there was produced to it the written consent of the owners of more than one-half of the feet front abutting on each street, along which it was proposed to construct a railway or an

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extension thereof, the members of the Bond Hill Welfare Association endeavored to obtain the signatures necessary in order to enable the council to act. They obtained the almost unanimous consent of property owners on Paddock road, but the property holders on Reading road refused to give their consent to have an extension built on said road. Public meetings were held in Bond Hill, and at one of these meetings at which several councilmen were present, among whom was Mr. Michael Mullen, the floor leader of council, the plan was evolved to change the name of the entire Paddock road to Reading road, and a small stretch of Reading road beyond Paddock road to Reading boulevard, whereby the majority of consents of abutting property holders on this new street called Reading road could be secured and the opposition of the property holders on Reading road proper would thus be overcome. Mr. Mullen frankly testified that he suggested this plan to the mass meeting, as he as well as council were anxious to give Bond Hill street railway communication with Cincinnati. Mr. Mullen further testified that Mr. Withrow, chairman of the Bond Hill Welfare Association, presented these ordinances changing the names to the proper council committee, which reported the ordinances favorably to council, and which passed them without any hearing in council in respect to these changes of names. Similarly the ordinance granting the street railroad franchise was recommended favorably by the proper committee to council, the majority of written consents of property owners on the old Paddock road changed to Reading road greatly outnumbering the dissents on Reading road proper, these consents having been re-signed after the passage of the ordinances changing names.

Against this action of council the first suit, No. 55091, was brought on November 22, 1911, by the abutting property owners on the Reading road in Avondale, who are named in said action, and which suit is against the Cincinnati Street Railway Company and the Cincinnati Traction Company. The second suit was filed later by Mr. David L. Carpenter, on behalf of the city of Cincinnati, as a taxpayer, against the city of Cincinnati and the two street railroad companies named. In both actions

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the plaintiffs pray that the ordinances changing the names of streets as well as the ordinance granting the street railroad franchise be declared invalid, and that the defendants be enjoined from constructing said street railroad extension and further carrying out the said contract between the city of Cincinnati and the said street railroad companies, and for such further relief as may be proper.

The first question which presents itself to the court, under the pleadings and the evidence is, what right has a judicial tribunal to review the determination of a municipal council expressed by the adoption of an ordinance?

The rule is expressed in 1 Dillon, Munic. Corp. Sec. 243, in the closing sentence of the section:

“And generally the judicial tribunals will not interfere with municipal corporations in their internal police and administrative government, unless they are transcending their powers, or some clear right has been withheld or wrong perpetrated or threatened.”

And the rule of legal determination to be applied is thus tersely stated by the same author, Sec. 239:

“The extent of the powers of municipalities whether express, implied or indispensable is one of construction. And here the fundamental and universal rule, which is as reasonable as it is necessary is, that while the construction is to be just, seeking first of all for the legislative intent, in order to give it fair effect, yet any ambiguity or fair, reasonable, substantial doubt as to the extent of the power is to be determined in favor of the state or general public and against the state's grantee.”

And here may be added the rule laid down by Mr. Brice in Greene's Brice's, *Ultra Vires* p. 371:

“Powers conferred upon corporations for the attainments of certain objects must be employed by them strictly and solely with reference to those objects only.”

It is well settled that the judicial branch of the government can not institute an inquiry into the motives of the legislative department in the enactment of laws, and in analogy to this rule it is true that courts will not in general inquire into the

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motives of a council in passing ordinances, but this rule has been qualified both by text-writers and the Supreme Courts of our states in this, that the acts of council may be impeached when the private property rights of a person or any civil right which is guaranteed by statute will be affected by the enforcement of the ordinance, and as the party aggrieved has no other adequate remedy for prevention of irreparable injury the courts sustain the right to relief by injunction. 1 Dillon, Munic. Corp. Sec. 650.

In our state the same rule has been adopted. Our Supreme Court, in the case of *State v. Gas Co.* 37 Ohio St. 45, has declared the rule to be as follows:

"The presumption is in favor of the good faith and validity of the action of the city council in passing such an ordinance; and this presumption may only be overcome by the averment of issuable facts showing the contrary. It is only where the facts show not a real but a mere colorable exercise of the authority vested in the council, that the ordinances can be held invalid."

"In the absence of facts showing fraud or bad faith on the part of the council, the inadequacy of the price of gas as fixed by the ordinance is not the subject of inquiry."

In accordance with the rule thus laid down by our Supreme Court, it will be the duty of this court to determine from the facts submitted by evidence whether the action of council in this instance was an exercise in good faith of its power to change the name of streets, or a colorable exercise of this power with reference to another object than the changing of street names.

A municipality can only exercise those powers which are delegated to it by the sovereign power of the state, and these powers thus delegated must be strictly construed.

Gen. Code 9105 limits the power of municipal councils to grant street railway franchises as follows:

"No such grant shall be made until there is produced to council, or the commissioners, as the case may be, the written consent of the owners of more than one-half of the feet front of the lots and lands abutting on the street or public way, along

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which it is proposed to construct such railway or extension thereof; and the provisions of all ordinances of the council relating thereto have in all respects been complied with, whether the railway proposed is an extension of an old or the granting of a new route."

The power to change the name of streets in the manner in which it was done in the case before me, as shown by the evidence, is granted to municipal councils by the state in the following words:

"On a petition by a person owning a lot in the corporation, praying that the name thereof be changed, the council of such municipality upon hearing, and upon being satisfied that there is good cause for such change of name; that it will not be detrimental to the general interest, and that it should be made, may declare by ordinance the name of such street changed." Gen. Code 3725.

The following section, Gen. Code 3726, under which, however, the action of council was not taken and could not have been taken, provides that the latter without petition may change the name of a street when there are two or more of the same names in the municipality. Both of these sections are grants of power by the state to the municipal councils. Both powers must be exercised in accordance with the law of the state and not in contravention thereof. Under Gen. Code 9105 consent of a majority of the property owners on each street upon which council desires to grant a street railway franchise is a prerequisite to the power of council to grant permission to build a street railway therein; and the action of council in granting such permission is not conclusive against the property owners on the street of the fact that the requisite majority have given their assent to the construction of the street railway proposed. *Roberts v. Easton*, 19 Ohio St. 78; *State v. Bell*, 34 Ohio St. 194; *Mt. Auburn Cable Ry. v. Neare*, 54 Ohio St. 153 [42 N. E. Rep. 768].

The consents of owners of lots abutting on a street to the construction and operation of a street railway on such street,

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are not property rights that can be appropriated under eminent domain, but are a personal right to the owner of the lot, and a power or sword in his hands with which to protect his lot against the arbitrary powers of the city authorities. A majority of consents by the feet front is a condition precedent to jurisdiction to grant a street railway franchise, and each abutting lot owner is free to aid in conferring such jurisdiction, and free to withhold such aid. *Hamilton, G. & C. Trac. Co. v. Parish*, 67 Ohio St. 181 [65 N. E. Rep. 1011; 60 L. R. A. 531].

The purpose of this statute is stated by our Supreme Court, in the case of *Roberts v. Eastman*, *supra*, as follows:

“The statute expressly prohibits the city authorities from permitting a street railroad to be constructed without such consent; it was, therefore, a condition precedent to the power of the city to grant the requisite permission to lay the track in controversy. The evident object of the act is, to protect the owners of property, on the streets of cities therein referred to, from the exercise of an arbitrary power, on the part of the city authorities, in permitting streets to be used for street railroads.”

The power to withhold this right of abutting property owners on each street lies with the state only. In fact, prior to the passage of the statute in question, unlimited power was given to municipal councils to grant street railway franchises without the intervention of abutting property owners, and the act in question was passed to take this power from councils. The general assembly in its wisdom might have passed an act granting the same right to the abutting property owners, but making the power of council to grant a street railway franchise dependent on the consent of a majority of feet front upon all of the streets on which the proposed extension of the street railway is to be made, instead of a majority of feet front on each single street; but the state has not seen fit to do this, and council must obey the state's mandate. It is the legislature, not council, that can give relief, when in its wisdom, such relief is proper.

Gen. Code 3725 under which the state has delegated power to municipalities to change the name of streets, when two or

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more streets do not have the same name, permits councils to do this upon determining the following jurisdictional facts: First, that there is good cause for such change of name; second, that it will not be detrimental to the general interest, and third, that such change should be made. The evidence introduced in the case at bar shows that two petitions were submitted to council which simply prayed for the change of the name of Paddock road to Reading road, and for a change of the name of a part of Reading road to Reading boulevard, without stating any cause for the change of said names. These petitions were referred by council to its committee on street railroads. This committee in both instances reported to council that these petitions be filed and recommended to council the passage of the ordinances changing the names named without stating that there was good cause for such change of name, and that it would not be detrimental to the general interest. Council, thereupon, on the same day that these reports were submitted, passed ordinances changing the names of these streets. The record of the proceedings of council show no determination on its part that there was good cause for such change of name, and that it would not be detrimental to the general interest. As testified by Mr. Mullen, council unanimously passed the ordinances believing that good cause for such change of names existed; that in making one street out of two distinct streets it enabled Bond Hill to obtain a majority of consents of abutting property holders on this one street, although said new street visibly consists of two streets, and that this procedure would override the objection of property holders on one of these streets, namely, Reading road; believing further, that this would not be detrimental to the general interest.

Laying aside for the present the question whether council can proceed in this manner without first by a vote expressing its determination that there was good cause for such change of names, and that such change was not detrimental to the public interest, let us examine from the facts submitted in evidence, whether this action of council was a *bona fide* exercise of the power vested in it under Gen. Code 3725, or merely a colorable

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exercise of power under this section, in order to circumvent the inhibition of the state as expressed in Gen. Code 9105, prohibiting council from granting street railway franchises, until a majority consent of the front feet is obtained from abutting property holders on each street, as said streets existed at the time when the street railway grant was sought to be given to the street railway company. It is not necessary from the evidence submitted that the court should pass upon the motives of the members of council. The facts introduced, issuable facts as our Supreme Court calls them, makes this unnecessary. It does not even necessitate an application of the well-known rule of equity that the court must look through the form for the substance, in order to do justice. The facts show that the petitioners to this change of names did not even state a cause for such change; that the committee to which these petitions were referred recommended to council that they should be filed and that the change of name should be made, and that council without passing by a vote upon the jurisdictional fact that a good cause for such change existed, and that such change would not be detrimental to the general interests, unanimously passed these ordinances for change of names; and the undisputed evidence before me shows that these ordinances were passed because council in endeavoring to grant the franchise to the street railway company, to extend the track of the Avondale line to Bond Hill, did not have the requisite statutory number of feet front of abutting property holders, on one street, Reading road, as required by Gen. Code 9105, to grant such franchises; that this change of names of entirely different and distinct streets was made to enable council to nullify the prohibition of the general assembly against granting such franchises until the majority of consents was obtained on each existing street. Can it be contended for one moment that the general interest thus named in the statute authorizing the change of names can mean the interest of a particular section of the city, as opposed to the general interest of all the citizens in protecting their civil rights? Surely, the general interest called for by this section does not mean a particular interest, no matter how

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worthy, as compared to the general interest in the enforcement of all the laws by which council is governed, and from which it derives its powers and which protects all abutting property holders alike.

I have already cited the well-known rule stated by Mr. Brice in his work on *Ultra Vires*, that powers conferred on corporations for the attainment of certain definite objects must be employed by them strictly and solely with reference to those objects only. A change in a street name when made by council must therefore apply only to the necessity of such change of name for street purposes. An examination of the evidence shows that there is no change in the physical condition of either street whose name is changed. All that council did was to give another street the same name as Reading road. Such change of name does not change the physical condition of separate streets upon which the law of Ohio permits abutting property holders to guard their rights against granting street railway franchises by council in opposition to their wishes. True, this is not a right of property on the part of abutting property holders, and can not be appropriated and compensation given in proceedings in eminent domain, but it is a right granted to all abutting property holders alike, and no power is granted to council to grant a street railway franchise until the majority of abutting property holders on each physical street have expressed their approbation. The act of council in thus changing names did not change the topography of Paddack road, by changing its name to Reading road, nor the topography of Reading road by taking part of the middle out of Reading road and calling it Reading Boulevard. This action from the undisputed evidence clearly shows that the purpose of council in thus changing the names was not for any purpose connected with said streets, as streets, but for the sole purpose of evading the provisions of Gen. Code 9105, prohibiting council from granting street railway franchises until the majority consent of the property holders on each street was secured. Undoubtedly council believe that it was endeavoring to aid a good cause, namely, to obtain street railway communication for Bond Hill with the city of

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Cincinnati, but this object must be obtained by legal means, not by endeavoring to evade an act of the general assembly prohibiting such action until certain conditions have been complied with. Council can not nullify such law by exercising a power colorably, granted distinctly for another purpose.

It is a well established rule of law that all legislation of our state in reference to the powers granted to municipalities is a connected whole, whether granting police or administrative powers to them. These statutes must therefore be construed *in pari materia*. To them must be applied the rule laid down by our Supreme Court in the case of *Cincinnati v. Connor*, 55 Ohio St. 89 [44 N. E. Rep. 582], as follows:

"It is an equally well established rule, that the provisions of the statute are to be construed in connection with all laws *in pari materia*, and especially with reference to the system of legislation of which they form a part, and so that all the provisions may, if possible, have operation according to their plain import. It is to be presumed that a code of statutes relating to one subject, was governed by one spirit and policy, and intended to be consistent and harmonious, in its several parts. And where, in a code or system of laws relating to a particular subject, a general policy is plainly declared, special provision should, when possible, be given a construction which will bring them in harmony with that policy. And it is only when, after applying these rules in the endeavor to harmonize the general and particular provisions of a statute, the repugnancy of the latter to the former is clearly manifest, that the intention of the legislature as declared in the general language of the statute is to be superseded."

This same rule is declared by the court of appeals of the state of New York in the case of *Smith v. People*, 47 N. Y. 330:

"A statute should not be so construed as to work a public mischief unless required by words of the most explicit and unequivocal import. In the construction of statutes, effect must be given to the intent of the legislature whenever it can be discerned, though such construction seem contrary to the letter of the statute. Words absolute in themselves, and lan-

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guage the most broad and comprehensive may be qualified and restricted, by reference to other parts of the same statute, to other acts *in pari materia*, passed before or after, or to the existing circumstances and facts to which they relate. So also contemporaneous legislation, although not precisely *in pari materia*, may be referred to for the same purpose."

And finally among the many decisions from the Supreme Courts of our sister states, let me cite the Supreme Court of Rhode Island in the case of *State v. Beck*, 21 R. I. 288 [43 Atl. Rep. 366; 45 L. R. A. 269], as follows:

"Statutes must be construed with reference to the whole system of which they form a part, and statutes upon cognate subjects may be referred to, although not strictly *in pari materia*."

Bearing these rules in mind, can there be any question that council has not the power to annul a law which prohibits it to grant a street railway franchise except under certain conditions which did not exist, by exercising a power granted to it by another statute for an entirely different purpose, namely: the changing of street names when good cause is shown, and the change is not detrimental to the general interest. This power, as shown by the evidence, was not exercised for the *bona fide* purpose of changing street names, but was colorably exercised by council for the purpose of enabling it to grant a street railway franchise, although the conditions did not exist under which it was authorized so to do; not for the *bona fide* purpose of changing the name of a street, predicated as the law provides upon good cause being shown, and not being detrimental to the public interest as opposed to a particular interest.

I have not inquired into the motives of the members of council. If, however, they are disclosed by the evidence submitted of issuable and probative facts, the court is acting within the rules governing a judicial review of governmental bodies, including of course municipal corporations, rules which I have stated and which are fully upheld by the United States Supreme Court in the case of *Soon Hing v. Crowley*, 113 U. S. 703 [5 Sup. Ct. Rep. 730; 28 L. Ed. 1145]:

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when duly exercised by ordinances, will override any license previously given by which the control of a certain street has been surrendered to any individual or corporation, is so well established, both by the cases in this court and in the courts of the several states, that a reference to the leading authorities upon the subject is sufficient. Indeed, the right of a city to improve its streets by regrading or otherwise is something so essential to its growth and prosperity that the common council can no more denude itself of that right than it can of its power to legislate for the health, safety and morals of its inhabitants."

In a more recent case, the United States Supreme Court, in the case of *Northern Pacific Ry. v. Duluth*, 208 U. S. 583 [28 Sup. Ct. Rep. 341; 52 L. Ed. 630], decided as follows:

"The right to exercise the police power is a continuing one that can not be limited or contracted away by the state or its municipality, nor can it be destroyed by compromise, as it is immaterial upon what consideration the attempted control is based.

"The exercise of the police power in the interest of public health and safety is to be maintained unhampered by contracts in private interests and uncompensated obedience to an ordinance passed in its exercise is not violative of property rights protected by the Federal Constitution."

Held: "That an ordinance of a municipality of a state valid under the law of that state as construed by its highest court, compelling a railroad to repair a viaduct constructed after the opening of the railroad by a city in pursuance of a contract relieving the railroad for a substantial consideration from making any repairs thereon for a term of years was not void under the contract, or the due process clause of the constitution."

In the case at bar the ordinance does not even state a consideration for the exemption of the street railway company from its share of the expense of eliminating the railway crossing.

Counsel for the defendants contend that it is sufficient if the court passes on the other questions involved in this case, but that Sec. 2b of the ordinance is not of the essence of the ordi-

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nance, and whether legal or not may be severed from Sec. 1 and Sec. 2 of the ordinance, and the validity of Sec. 2b determined when a future council sees fit to declare its purpose to build a viaduct. The evidence submitted, both oral and written, shows that this ordinance was the result of an agreement between the Welfare Association of Bond Hill and the Traction Company, the latter only being willing to lay a single track road to the railway crossing, and not to Bond Hill, and this only upon the grant of the exemption by the city authorities from its share of the expense necessary to eliminate the railway crossing when made, and that council adopted this ordinance in this manner.

To test this provision of the ordinance, a separate suit was brought by Mr. Carpenter as a taxpayer under the provision of Gen. Code 4311 and 4314, which provides that the city solicitor shall apply in the name of the corporation for an injunction to restrain the abuse of corporate power or the execution or performance of any contract made in behalf of the corporation in contravention of any law, and when the solicitor refuses to do so, that a taxpayer may bring such suit. The solicitor refused and Mr. Carpenter brought the suit. Such suit must be brought within one year after council has acted. All the counsel in the case at bar joined in the following entry in this court:

"By consent of all the parties herein named in open court, it is hereby ordered that this case be heard with cause No. 55091 in this court, wherein David L. Carpenter et al. are the plaintiffs, and the Cincinnati Traction Company et al. are the defendants; that the evidence heard herein shall apply to both causes and that at the determination of said causes in this court, a bill of exceptions in one of said causes shall be deemed and considered a bill of exceptions in both of said causes and may be marked with the number and style of both causes."

The taxpayer's suit is, therefore, before me for determination, a duty which this court must perform.

The claim is also advanced that if Sec. 2b of this ordinance is illegal, it may be separated from the entire ordinance, and the latter still upheld, but in the case of *Wellston v. Morgan*, 59 Ohio St. 147 [52 N. E. Rep. 127], our Supreme Court con-

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sidered a case in which the council of Wellston purported to make a contract granting the giving of exclusive rights, and stipulating for lighting streets for 99 years. The court decided that the ordinance was wholly void. The question was raised as to whether only the excess of over ten years might not be lopped off, but at page 156, the court said:

"It is suggested, however, that the ordinance was not absolutely void, but may be treated as good for the term of ten years, since the subject-matter is not *ultra vires*, and inasmuch as 99 years is greater than ten years, must include it; and hence, the contract in that way may be supported. This implies that the purpose of the law is only to prevent the enforcement of contracts made in violation of its terms, and not to prevent the making of such contracts. The language of the statute is that the municipalities referred to shall have power to contract for light for any term not exceeding ten years. This implies, with as much force as if it had been expressly stated, that the municipality shall not have power to contract for any term longer than ten years, and the natural inference is, we think, that the purpose is to inhibit such contracts entirely, for the only certain way of insuring their nonenforcement is to prevent their attempted execution. This may not be effectually accomplished unless they are held to be void; and this is in accord with the general rule which is well expressed by Professor Freeman, in his note to *Robinson v. Mayor*, 1 Humph. 156 (Tenn.) [34 Am. Dec. 625], as it (the municipal corporation) is permitted to exercise the powers which its charter authorizes, so it is prohibited from exercising those which are not authorized. Any act or attempted exercise of power which transcends the limits expressed or necessarily inferred from the language of the instrument by which its powers are conferred, is beyond the authority of a municipal corporation, and is therefore, null and void."

In concluding this branch of the case let me cite the case of *Gas Light & Coke Co. v. Columbus*, 50 Ohio St. 65 [33 N. E. Rep. 292; 19 L. R. A. 510; 40 Am. St. Rep. 648], reiterating the rule that council has no power to grant any rights where-

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by it would hamper and embarrass future councils in the exercise of legislative powers.

"The power to grade and improve streets is conferred upon municipal authorities for the public benefit. It is a continuing power, and is not exhausted by the first exercise of it; nor can it, in the absence of statutory authority, be ceded or bargained away; nor can one council, by its exercise, abridge the capacity of its successors to perform their duties in that behalf, as the public interest may demand."

And on pages 68 and 69 the court says:

"The council is to perform the duty, and it is elementary, we suppose, that the council can not, in the exercise of legislative powers, bind its successors, unless authority from the state to do so is clearly indicated. The corporation can not abridge its own legislative power.

"It would follow from this that in prescribing regulations, or annexing conditions, by the city, to the exercise by a gas company, of a right in a street to enjoy the same for this secondary use, the council has not the authority to cede away, nor bargain, away the right of the city to perform its public duties, especially as to a primary use of its streets, nor to abridge the capacity of its successors to discharge those duties, unless some express provisions of statute is found to that effect, and that is not claimed."

And, finally, let me ask since when can a municipal council barter away the police power of a state, when even the state can not do so?

Having thus applied the law to the facts as they appear from the evidence, the court finds that the ordinance changing the name of Paddack road to Reading road, and part of Reading road to Reading boulevard are invalid, as well as the ordinance granting a franchise to the Cincinnati Street Railway Company and the Cincinnati Traction Company to continue its Avondale line to a point south of the N. & W. and B. & O. Railway crossings, and that plaintiffs in both suits are entitled to a permanent restraining order prohibiting the defendants from

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constructing such extension of street railway line in front of their property on Reading road, and such permanent restraining order is herewith granted.

INTOXICATING LIQUORS.

[Hamilton Common Pleas, March, 1911.]

CAROLINE M. HULBERT ET AL V. CHARLES E. ROTH (CO. TREAS.).

1. Owner of Premises may Raise Issue of Fact as to Sales of Intoxicating Liquors Being Made on his Premises against Enforcement of Lien for Dow Tax.

An owner of property, not a party to the sale of intoxicating liquors on his premises when enforcement of the lien for Dow tax against the property on account of such sales is attempted under Gen. Code 6092, may take issue as to the fact of sales having been made thereon.

2. Evidence Sufficient to Establish Sales of Intoxicating Liquors by Seller not Sufficient against Owner of Property where Sold.

No lien for Dow tax under Gen. Code 6072 is created against property unless the "business of trafficking in spirituous liquors" has been conducted on the premises; hence, evidence which would be sufficient to establish such traffic against those making the sales may not be sufficient to establish the fact against the owner of the property, even though actual or constructive knowledge of such sales by the owner is not necessary to support the lien.

3. Evidence of Accomplices in Unlawful, Surreptitious Sales of Intoxicating Liquors Raises no Presumption against Owner of Property.

While Gen. Code 6087 may make competent the testimony of accomplices in crime, or of self-convicted moral degenerates who induce the commission by another of an unlawful act, for the purpose of creating evidence as to such act, such testimony raises no presumption against a property owner as to sales of intoxicating liquor by others on his premises, although if supported by corroborative circumstances it may create a presumption against the persons who made the sales.

[Syllabus approved by the court.]

INJUNCTION.

DeCamp & Sutphin, for plaintiff.

Hunt, Bettman & Merrell, for defendant.

HUNT, J.

In the regulation of the liquor traffic, the state in the absence of power to regulate by license has availed itself of its right to

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tax the traffic. The right of the state in the exercise of its sovereign power to tax is restricted and regulated only by the constitution. Within the constitutional limitations the remedy for any abuse in taxation is political and not judicial. In the exercise of police power such traffic may be further regulated in accordance with the varying necessities of the public welfare. The extent of such power is only measured by the necessity of such regulation, in the determination of which the legislature in all cases is not only the primary judge, but also the only judge, except possibly in cases of gross and flagrant abuse of such power. The object of taxation is revenue, but there is no constitutional objection to the use of the taxing power not only for such purpose, but incidentally for otherwise promoting the general welfare.

In so far as taxes upon property are to be levied, the constitution provides that: "Laws shall be passed taxing by uniform rule all moneys," etc., "also all real and personal property according to its true value."

There is no provision for taxing property according to the use made of such property, although a tax upon such use might be levied and such tax made a lien upon the property of the user without controverting any constitutional provision; but when the property of another in no sense a party to such use is made liable for such taxes, the inapplicability of the constitutional requirement that taxation upon property shall be uniform and according to its true value and the constitutional prohibition as to taking private property without compensation, is not so apparent.

Although property rights existed prior to the existence of the state, it is true that property is now held or acquired subject to the laws of the state. Nevertheless there are constitutional limitations as to such laws.

For instance, what would be said of a law which provided that no property could be held or acquired except subject to the right of the state to take it without compensation? The limitation of the operation of ordinary principles and rules of law is reached when such operation conflicts with constitutional provisions, even when applied to liquor legislation, which may al-

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most be regarded as *sui generis* in judicial and legislative interpretation.

Conceding, however, for the purposes of this case as we should if possible, that the statutory provisions as to a lien upon the property of the plaintiff are constitutional, such lien is not created unless the "business of trafficking in spirituous," etc., liquors is being conducted upon plaintiff's property. As to whether this is a fact the plaintiff is entitled to invoke a judicial inquiry under his right to "due process of law." That sales may have been made upon the property or that such sales as to the person making them may be sufficient to establish as a fact the carrying on of the business of trafficking in spirituous, etc., liquors, does not preclude the plaintiff, who was not a party to such sales, from taking issue as to such fact.

Each of the two witnesses offered by the defendant testified that on a different day, at the request of the witness, bottled beer was supplied by plaintiff's tenant, paid for by such witness and there given by him to his prostitute companion, taken there by him for immoral purposes.

The plaintiffs offer evidence tending to establish that no business of trafficking in such liquors was conducted upon the premises.

The statute may make competent the testimony of accomplices in crime or self-convicted moral degenerates who induce the commission by another of an unlawful act, or an act seriously detrimental to otherwise innocent parties, and may encourage such evidence by granting immunity or other rewards therefor, but can not give such evidence credibility, and the more encouragement the statute holds out to the giving of such evidence, the less its credibility. Such evidence if supported by corroborative circumstances, may be sufficient to raise a presumption against parties to an alleged unlawful act, which presumption in the absence of an explanation by them, would be sufficient to establish the fact, but can raise no presumption against persons not parties thereto.

The rule that one or several sales of liquors raises a presumption that a business was being conducted requiring explanation from the party making such sales, has therefore no ap-

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plication to persons in no manner parties to such sales, except that their property is sought to be charged with a lien for the payment of a tax chargeable only on property where the business of trafficking in such liquors is conducted, and the fact that the identical evidence offered in this case was sufficient to establish as against parties making the sales, the fact that such business was being conducted does not make such evidence sufficient to establish such fact against the owners of the property, even though actual constructive knowledge of such sales by the owner be not necessary to support such lien.

The injunction prayed for in the petition is therefore granted.

EXECUTORS AND ADMINISTRATORS—TAXES.

[Hamilton Common Pleas, 1913.]

STATE EX REL. HUNT, PROS. ATTY. V. AMERICAN BONDING CO. AND
NATIONAL SURETY CO.

1. Surety on Administration Bond and Surety on Sale of Real Estate for Distribution to Legatees are Respectively and Proportionately Liable for Collateral Inheritance Tax Unpaid.

Where an executor gave a general administration bond in the sum of two thousand dollars with one bonding company as surety and afterwards gave the bond required by statute to be given before the sale of real estate, in the sum of forty-six thousand dollars with another bonding company as surety and distributed the entire proceeds of the estate to legatees named in the will, without paying the collateral inheritance tax due to the state of Ohio, and thereafter died insolvent and all the legatees are without the jurisdiction of the state, both surety companies are liable as cosureties in their respective proportions to the state for the payment of such collateral inheritance tax, though the executor had personal property in his possession sufficient to pay such collateral inheritance tax before the sale of the real estate from which proceeds were realized with which to pay the legacies.

2. Inheritance Taxes are Excise Taxes.

Inheritance taxes properly understood are taxes on the right and privilege to inherit or succeed to property, are excise taxes and not taxes on the property received.

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3. Inheritance Tax Paid by Executor is on Account of Legatees and Distributees.

Although an executor is made liable under the statute for the payment of a collateral inheritance tax, such tax is not paid on account of the estate, but on account of the legatee or distributee, whom the state is unwilling to trust.

[Syllabus by the court.]

DEMURRER to petition.

Pogue, Campbell & Groom, for plaintiff.

D. C. Outcale, for American Bonding Co.

Healy, Ferris & McArroy, for National Surety Co.

MAY, J.

The State of Ohio on relation of the prosecuting attorney, filed its petition against defendants, the American Bonding Company and the National Surety Company, alleging that J. Henry Sulser was appointed executor of the last will of Louis Ertel, who died March 7, 1900, in case No. 49006 of the probate court of Hamilton county, Ohio, and executed a bond in the sum of \$2000 with the American Bonding & Trust Company as surety, and that afterwards, on July 24, 1900, he executed a bond in an action brought by him to sell real estate for the payment of legacies, in the sum of \$46000 with The National Surety Co. as surety. The \$2000 bond provided that the executor should "administer according to law and the will of the testator, all his goods, chattels, rights and credits and the proceeds of all his real estate sold for payments of debts or legacies, which comes to the possession of the executor or to the possession of any other person for him." The \$46000 bond contained the following: "Now therefore, if the said J. Henry Sulser shall faithfully discharge his duties as executor of the aforesaid estate and shall faithfully make payment and account for all the moneys arising from such sale, according to law, then this obligation shall be void; otherwise remain in full force."

The state further alleges that the executor collected all the personal estate of the deceased and sold all of his real estate; that the said executor did not faithfully discharge his duties as executor of said Louis Ertel, deceased, and did not faithfully make payment and accounting according to law, of all moneys

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arising from the sale of the real estate, but failed, neglected and refused so to do; that on October 22, 1902, by an order of the probate court made in the administration of the estate of Louis Ertel, deceased, the executor was ordered to pay forthwith to the treasurer of Hamilton county the sum of \$512.53 as interest, in view of the collateral inheritance tax due from the estate of Louis Ertel as found by an order in said cause made by the probate court, and that wherefore judgment is asked against the sureties, who upon demand refused to pay the judgment for said collateral inheritance tax as was found due.

To this petition the American Bonding Company filed its answer, admitting the execution of the bond and reciting the execution of the bond by the National Surety Company, admits the amount due as collateral inheritance tax and that the executor has failed to pay the same. The American Bonding Company further states "that by reason of the execution of said bonds, this answering defendant and its codefendant, the National Surety Company, became and were cosureties for the faithful discharge of all duties by said executor and that they were respectively liable in proportion according to the amounts of their respective bonds; that the American became the surety for one-twenty-fourth, and the National Surety Company became the surety for twenty-three-twenty-fourths of the amount of any default that might be made by any executor under the administration of such estate."

The National Surety Company by its answer admits the appointment of the executor and the giving of a bond by him in the sum of \$2000 with the American Bonding & Trust Company as surety. The National Surety Company in its answer, first states that the bond so given was conditioned upon the faithful administration of the trust by said executor. It also admits that it gave a bond on July 24, 1900, for the sum of \$46000, on condition that the executor would faithfully discharge his duties as executor and faithfully make payment and accounting for all moneys arising from the sale of real estate according to law. The National Surety Company in its answer further avers that the collateral inheritance tax claimed by the state, became due and payable immediately upon the death of the testator, Louis

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Ertel, and at once became a lien upon the property of his estate both real and personal, and that the executor upon his appointment, took title to all the personal property which came into his hands at the time he was appointed and gave bond with the American Bonding & Trust Company as surety, and that prior to the giving of the bond by the National Surety Company, the executor had in his hands more than \$3000 in money, the proceeds of personal property, which sum of money was more than sufficient for the payment of funeral expenses, of the expenses of administration and debts entitled to preference under the laws of the United States, and all public rates and taxes, including the inheritance tax sued for, and that because said executor did not pay the collateral inheritance tax out of the money realized from the personal property, the condition of the bond issued by the American Bonding Company was broken and that the American Bonding Company became liable to the state for said default, and that the National Surety Company is in no wise liable to the state of Ohio because said collateral inheritance tax was not paid, it being the duty of the executor to use the personal property for the payment of taxes before using any of the proceeds arising from the sale of real estate for such purposes. The National Surety Company, therefore, asks to be dismissed from this action.

To this answer and cross petition of the National Surety Company the American Bonding Company filed its demurrer, for the reason that it does not set forth facts sufficient to constitute a cause of action against the defendant, the American Bonding Company.

The sole question in this case is whether the American Bonding Company alone, or both surety companies, are liable for the default of the executor in not paying the collateral inheritance tax. On behalf of the National Surety Company it is contended that it is the duty of the executor to use the personal property of the estate for the payment of taxes, and that if he fails to do so and there is a default in this respect, the only surety that can be held for this default is the surety that was on the general administration bond. This claim is founded on

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Gen. Code 10714, providing for an order in which debts are to be paid.

This section reads:

“Every executor or administrator shall proceed with diligence to pay the debts of the deceased, applying the assets in the following order:

1. The funeral expenses, those of the last sickness, and the expenses of administration;
2. The allowance made to the widow and children for their support for twelve months;
3. Debts entitled to a preference under the laws of the United States;
4. Public rates and taxes, and sums due the state for duties on sales at auction;
5. To every person who performed manual labor in the service of the deceased, before payment of the general creditors;
6. Debts due all other persons.”

It will be sufficient to state that this section merely fixes the priority of payments and designates the persons who are entitled to preferential payments. It does not follow that if the executor does not make these payments from the funds in his possession at the time he has these funds, that this is a default of his and that his surety only is liable for such default. If the executor gets into his possession money from other sources than personal property, as for instance, proceeds from the sale of real estate, and commingles these proceeds with the money he derived from the personal estate, and then there is a default, both sureties will be liable.

This certainly must be true as far as taxes are concerned. The real estate which is held for the payment of debts or legacies may have a lien upon it for taxes, and if the proceeds are not used for the payment of these taxes, there would be such a default as is provided for in the bond; that is, the executor would not have accounted for all the moneys arising from such sale according to law, because one of the provisions of the statutes is that after the payment of the cost of the suit in which the proceeds are brought, the taxes must then first be paid.

However, it is not necessary to rest my opinion on this sec-

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proceeds of this real estate without deducting therefrom the amount due the state of Ohio, on each respective legacy, there was a default for which his surety, the National Surety Company, would be liable.

It was contended at the argument that it was the duty of the executor to proceed immediately to have this collateral inheritance tax ascertained, and that because he failed to do so and did not use the money of the personal estate for that payment, that therefore the surety on the general administration bond was the only one liable.

While undoubtedly, it was the duty of the executor to proceed immediately to ascertain this tax, nevertheless, as this tax, as stated above, is due on the right of succession and not on the right of property, this tax could not be ascertained until after the property was sold, for the reason that there might not have been sufficient property to pay the legacies. In that event, the state would only be entitled to receive a collateral inheritance tax on the amount actually paid to each legatee.

In *Gihon, In re*, 169 N. Y. 443, 447 [62 N. E. Rep. 561], the court say:

"Therefore, though the administrator or executor, is required to pay the tax, he pays it out of the legacy for the legatee, not on account of the estate. The requirement of the statute that the executor or administrator shall make payment is prescribed to secure such payment, because the government is unwilling to trust solely to the legatee. No one questions that where a legacy is given for a specified amount the tax must be deducted from the amount of the legacy and the balance only given to the legatee."

If no transfer is effected because it turns out that there is no property to transfer, no tax can be collected; and if the legatee renounces the gift and refuses to receive it, no tax can be collected with respect to him because there is no transfer to him. The fact that the tax is payable at the death of the testator controls the question of interest, but certainly controls no other question germane to the point under consideration.

"A testator may direct that the tax on a particular legacy shall be paid out of his estate; nevertheless, in reality, the tax

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is still paid out of the legacy, the effect of the direction of the testator being merely to increase the amount of the legacy."

In the case of *Wolf, In re*, 89 App. Div. 349 [85 N. Y. Supp. 949], affirmed, *Wolf, In re*, 179 N. Y. 599 [72 N. E. Rep. 1152], on the opinion below, it was held that where a legatee named in a will, subsequent to the death of the testator, and without intent to evade the transfer tax, renounces the legacy, which thereupon passes to another person under the residuary clause of the will, the legacy is not subject to a transfer tax calculated at the rate at which it would have been taxable if it had been actually accepted by the original legatee, but is taxable at the rate at which it would have been taxable, if it had been originally bequeathed as part of a residuary estate. The transfer tax is upon the transfer or succession, and not upon the property or estate of the deceased.

See also *Zefita, Countess de Rohan-Chabot, In re*, 167 N. Y. 280 [60 N. E. Rep. 598]; and *Phipps, In re*, 77 Hun. 325 [28 N. Y. Supp. 330]; affirmed, *Phipps, In re*, 143 N. Y. 641 [37 N. E. Rep. 823].

Therefore, inasmuch as the amount of the collateral inheritance tax could not have been ascertained until the amount of the legacy payable to each legatee was ascertained, and as the amount payable to each legatee under the will could not be ascertained until the property was sold for the payment of legacies, and as this property could not be sold without a bond being given, and as this bond was given with the National Surety Company as surety, the proceeds of the sale of the real estate, together with the proceeds of the personal estate, both being necessary for the payment of the legacies, the collateral inheritance taxes due the state, which were ascertained after the sale of the real estate, and the executor neglecting to pay such taxes, made a default in that he did not properly account for both the proceeds of the personal estate and of those realized from the sale of the real estate, and therefore both bonds are liable for such default.

It was conceded on the argument that if both sureties should be found liable for the default of the executor, that they would be liable as cosureties and in proportion to the respective

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amounts of their bonds. This was the ruling of the court in *Kehnast v. Daum*, 6 Dec. 401 (4 N. P. 366).

The demurrer of the American Bonding Company to the answer and cross petition of the National Surety Company will be sustained.

WILLS.

[Licking Common Pleas, April Term, 1910.]

LOUIS S. DEBOW ET AL. V. FIFTH STREET BAPTIST CHURCH.

Person interested in Will at Probate only can Contest Will.

An action to contest a will under Gen. Code 12079 can be maintained only by one who was interested in the will at the time it was admitted to probate.

[Syllabus approved by the court.]

MOTION to dismiss.

Smythe & Smythe, for plaintiffs.

J. R. Davies, for defendant.

SEWARD, J. (Orally.)

This case is submitted to the court upon a motion to dismiss as to three of the plaintiffs. The action is to contest a will. Katherine DeBow was one of the devisees mentioned in the will, and was living at the time the will was offered for probate, and died subsequent to the admission of the will to probate, leaving Louis DeBow, William DeBow and Ernest DeBow—three of the plaintiffs; and they file a petition to contest the will.

This motion raises the question as to whether any person can file a petition to contest a will, unless he or she is interested in the will at the date of its being admitted to probate.

The status of the parties was fixed by the admission of the will to probate.

The court was inclined to look upon this motion, upon its presentation, as without much force. The court was cited to

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Taylor v. Taylor, 18 Dec. 101 (5 N. S. 323) and *Rockwell v. Blaney*, 18 Dec. 436 (5 N. S. 580), and will simply read the syllabus of the cases, and leave counsel to get the reasoning of the judge, which seems to be conclusive to the court, that only parties who are interested in the will at the time that it is admitted to probate may file a petition to contest the will. Gen. Code 12079 reads as follows:

“A person interested in a will or codicil admitted to probate in the probate court, or court of common pleas on appeal, may contest its validity by a civil action in the common pleas court of the county in which such probate was had.”

The case of *Taylor v. Taylor*, *supra*, is almost on all fours with the case at bar. Judge Swing says:

“Under Section 5858, Revised Statutes (12079 of the new code), the right to contest a will after it has been admitted to probate is in those persons only who were interested in the will at the time of its probate, and this right does not pass to the heirs of one who was interested in the will at the time of its probate, and who died within two years thereafter without bringing such an action.”

The other case to the same import decided by Judge Brod-rick, *Rockwell v. Blaney*, *supra*, holds:

“1. In a proceeding to contest a will, under the statutes of Ohio, only such parties as were interested in the will at the time of the probate thereof are proper parties plaintiff.

“2. If all the parties plaintiff die after an action is begun and before trial is had, the action can not be revived in the names of the heirs or devisees of such deceased plaintiffs.”

Quite an interesting case is *Storrs v. Hospital*, 180 Ill. 368 [54 N. E. Rep. 185; 72 Am. St. Rep. 211], construing a statute very similar to ours, and the same holding is made there; and that case is followed.

This motion will be sustained and exceptions noted.

Bunger v. Railway.**CARRIERS—NEGLIGENCE—RAILROADS.**

[Preble Common Pleas, June 1913.]

EDWARD C. BUNGER v. DAYTON & UNION RY.**1. Report of Committee Recommending Legislation not Judicial Authority but Considered in Interpretation of Act.**

The report of a committee recommending the passage of an act, while not reaching the dignity of judicial authority may be considered in the interpretation of the legislative enactment.

2. Knowledge of Employees as to Negligence or Defect not Interpolatable as Exception Exempting Railroad from Liability.

The first section of the Federal Employers' Liability act of 1908 charges interstate railroads with liability to any employee for all damages arising in whole or in part by reason of the negligence of any of its officers or employees or any defect due to its negligence in its engines, etc. The first section contains no exception and in view of the remedial character of the statute and the purpose of its enactment, it is not permissible for a court to interpolate an exception exempting such railroads from liability to such employees as may know of the negligence or the defect.

3. Federal Employers' Liability Act, Invalidating Contract or Device Exempting Railroad's Liability, Abolishes Assumption of Risk.

The weight of authority (and particularly the decisions of the federal courts) is that the doctrine of assumption of risk is based upon an implied term of the contract of employment. Section 5 of the Federal Employers' Liability act invalidates any contract or device whereby any carrier seeks to exempt itself from any liability created by the act. By virtue of Sec. 5 the doctrine of the assumption of risk is abolished. To hold otherwise would give to an implied contract greater efficacy than the act would permit to be given to an express contract.

4. Provision Abolishing Doctrine of Assumed Risks is Enlargement, not Limitation on Railroad Liability to Employee.

Section 4 of the Federal Employers' Liability act which expressly abolishes the doctrine of assumed risk in certain instances where the carrier is negligent and that negligence contributed to the injury, does not have the effect of limiting the liability under Secs. 1 and 5 of the act for injuries caused in whole or in part, by the carrier's negligence. The maxim "*expressio unius est exclusio alterius*" does not apply for the reason that Sec. 4 is an enlargement of liability and not a limitation.

5. Employee Assumes Ordinary Dangers Incident to Employment not Due to Carrier's Negligence.

The doctrine of assumption of risk of the negligence of the carrier has been entirely abolished by the Federal Employers'

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which act protects such employes, so far as it can be done pecuniarily, against injury sustained through the negligence of their employers. Is it possible that under such a law, the employer may, in effect, successfully plead its own negligence as a defense to an action brought under its provisions? That is to say that open and long continued negligence is a defense, though it would be liable if the negligence was slight, temporary, and of such a character as to escape general observation.

The defense now considered in this case is that the defects in question had long existed and were well known to the plaintiff. The effect of permitting such a plea is that the more open, flagrant and persistent the negligence of the carrier is, the better defense it has when such negligence results in injury to the employe.

To the maxim "*Volenti non fit*," "No injury to he who consents," might be replied, "*Nemo ex suo delicto*," "No man may profit by his own wrong."

The doctrine of assumption of the risk of the master's negligence was always a hard one, as many courts have held. In the eyes of this court at least, it was always a rule abhorrent and repugnant to natural justice. It compelled men, for the sake of gaining their daily bread, to needlessly risk their limbs and lives in the service of some careless or penurious employer, fearful that a complaint might jeopardize their means of livelihood. In case of accident it penalized and left without remedy the man who had, uncomplaining, done his best with the defective means supplied him by his negligent employer. It is a rule that this court feels will in time be everywhere abolished; should only be enforced where the present state of the law makes it plainly applicable, and should never be read into a statute by implication.

The court has examined all the authorities accessible that were cited in the briefs, but has not deemed it necessary to attempt to comment upon them, believing it has made its views plain in what it has said. The court wishes however to express its appreciation of the excellent and thorough presentation which the case has received through counsel.

It is claimed that the court erred in the charge as to the

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standard of equipment to be maintained by the defendant. The court endeavored to give the rule in substance as approved by the Supreme Court in *Pittsburg & L. E. Ry. v. Henly*, 48 Ohio St. 608, 612 [29 N. E. Rep. 575; 15 L. R. A. 384]. The court has no report of the charge before it, but the statement in oral argument as to what was said is not exactly in accord with the court's own recollection of its language. Still, assuming that the court said what it is quoted as saying, it is not believed by it, that any prejudicial error thereby resulted.

The motion for a new trial will be overruled and judgment entered on the verdict. Statutory time granted for the preparation of a bill of exceptions.

DRAINS AND DITCHES—WATERS AND WATER-COURSES.

[Franklin Common Pleas, May, 1913.]

NELLIE O. HOFFHINES v. CHARLES E. HOTT.

1. Underground Drains to Carry Waters from Ponds Having no Outlet and Different Watershed Except in High Water Enjoined.

Injunction lies to prevent an upper proprietor from constructing underground drains on his own lands so as to precipitate upon a lower proprietor water from and drain several ponds into which the surface water on his land under normal conditions naturally flows, evaporating and percolating into the soil during the greater part of the year, the ponds having no outlets except when heavy rains or melting snow causes the water to overflow their rims, spread out over the surface of the ground and diffusing with other water on the surface adjoining the ponds until the waters reach a slight depression several rods away into which the waters are conducted to and through a public road culvert to and on the lower proprietor's land; and especially since there is no natural channel from the ponds or depression in the land immediately adjoining, and the ponds are separated by a natural watershed from the land intended to drain them.

2. Adequate Means Provided by Statute for Drainage of no Outlet Ponds in Interest of Good Husbandry.

An owner has no right to construct a ditch on his own lands and empty ponds thereon, the water in which but for artificial means will not flow upon the lands of another nor does the fact that good husbandry and progressive advancement in

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agriculture are opposed to keeping ponds standing undrained give the right to damage a lower proprietor, especially since an adequate means is afforded by Gen. Code 6606, providing for the construction of a township ditch or the construction of an underground drain pursuant to Gen. Code 6653 et seq.

3. Civil Law as to Drainage Governs in Ohio.

The civil law, acting upon the maxim that water is descendible by nature and its usual flow should not be interfered with, and putting the burden upon the land where it naturally flows rather than upon the land where it is forced to flow by artificial means, is the law in Ohio.

4. Proof of Actual Injury from Ditch not Necessary in Injunction.

Actual injury need not be proved in a suit to enjoin the maintenance of a ditch.

[Syllabus approved by the court.]

INJUNCTION.

Donaldson & Tussing, for plaintiff:

Cited and commented upon by the following authorities:

Butler v. Peck, 16 Ohio St. 335 [88 Am. Dec. 452]; *Pontifical College v. Kleeli*, 18 Dec. 703 (5 N. S. 241); *Farnham, Waters Sec. 878*; *Bowlsby v. Speer*, 31 N. J. Law (2 Vroom) 354 [86 Am. Dec. 216]; *Dubois v. Glaub*, 52 Pa. St. 238; *Dayton v. Drainage Commissioners*, 128 Ill. 271 [21 N. E. Rep. 198]; *Nye v. Kahlow*, 98 Minn. 81 [107 N. W. Rep. 733]; *Anderson v. Henderson*, 124 Ill. 164 [16 N. E. Rep. 232]; *Erhard v. Wagner*, 104 Minn. 258 [116 N. W. Rep. 577].

M. E. Thrailkill, for defendant.

KINKEAD, J.

Plaintiff seeks to enjoin defendant from draining a pond located on his land by construction of a tile which will cause the water to empty on her field.

On defendant's lands about forty rods east of a road which divides plaintiff's and defendant's lands is a natural basin or pond containing about one-half acre in area and varying in depth from one to two feet, in which water stands almost the entire year and which has no outlet except that in times of very heavy rain fall, melting snows and freshets the water accumulating therein overflows the rim thereof and flows down westward on to the road and thence across the same through

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an iron pipe on to the lands of plaintiff where it spreads over the surface of plaintiff's lands.

About thirty rods south of the basin is another natural basin or pond containing about one-half acre, having no outlet. About thirty rods north of the first is another basin or pond containing about one-fourth of an acre in area.

It is the intention of defendant to drain the water from all the basins through underground ditches in the manner and course stated.

It is established that the water stands in the middle pond for eight or nine months in the year, evaporating and percolating into the ground in the dry season.

Witnesses testify that there is no natural outlet or channel from the pond; that in times of unusual freshets when the water in the pond raises to two feet the water runs over the rim at its lowest place and that the overflow runs towards the land of defendant; that when it reaches a point about 100 feet from the road there is a clearly marked depression into which it runs, passing through the culvert under the road and onto plaintiff's property.

A witness called by defendant and who lived on defendant's land many years states that there never was a ditch from the pond towards defendant's land.

The engineer and all the witnesses on both sides state that to a point from 100 to 200 feet from the pond towards the land of defendant the slope of the land is towards the pond instead of towards plaintiff's land and that at such point there is a natural rim or barrier formed by a natural raise in the earth which keeps the water from flowing from or out of the pond except at times of unusual rain or freshets when it overflows.

Beyond this barrier or raise of land there is a gradual depression in the general surface of the land toward that of plaintiff; there is no channel whatever until within about 100 feet of the road when there is a distinct depression, into which the surface water in general, and that arising from the overflow from the pond runs passing on to plaintiff's land.

This state of facts shows that the decisions of this court in *Pontifical College v. Kleeli*, 18 Dec. 703 (5 N. S. 241), Rogers,

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living, permanent or continuing stream of water, although it need not flow all the time. If it spreads out, or becomes stagnant it is no longer a watercourse but becomes a pond. Farnham, Waters pp. 1560, 1562. *Trustees of School v. Schroll*, 120 Ill. 509 [12 N. E. Rep. 243; 60 Am. Rep. 575]; *Parke Co. (Comrs.) v. Wagner*, 138 Ind. 609 [38 N. E. Rep. 171].

On the facts established by the evidence in this case there are two lines of authority maintaining contrary views as to the principles of law concerning the rights of upper and lower proprietor in the drainage of ponds.

For example it is said that the natural outlet of a pond is the direction in which the water flows or escapes therefrom when filled beyond a certain level. Farnham, Waters, p. 2625. *Lambert v. Alcorn*, 144 Ill. 313 [33 N. E. Rep. 53; 21 L. R. A. 611], is a case in which the facts are much like these here. There were ponds formed by surface water which, if left to the natural course, very little, if any water would flow on complainant's lands which were under good cultivation. The defendant was preparing to drain all his lands; the natural course of water was not to and upon the lands of complainants, and would not reach them except by artificial means. It was settled by the court that there could be no watercourse unless there was a ravine, swale or depression so situated as to fall upon the dominant tract, and to conduct it along a defined course; and when the surface water uniformly flows over a given course the line of the flow is a watercourse, which the court held, may be deepened, the right to drain being sustained on the ground that when the swamp or pond overflowed, the water passed off from the lands through a natural depression. It appears that that which did not so pass off, percolated or evaporated.

The report of the case as to the facts is not clear, and its reasoning is not satisfactory as an authority, though there is slight similarity between the facts in that and this case.

In this case at bar there being no channel from the rim of the basin, the water overflowing from the pond mingles with the surface water generally, running in a diffused state along the surface of the earth until it reaches the well defined channel at the point within 100 feet of the road.

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In *Peck v. Herrington*, 109 Ill. 611 [50 Am. Rep. 627], it was held that the upper owner of land on which there is a pond may not drain into its accustomed outlet or natural drain. But there was a natural drain in that case, as there is not here.

In *Adritt v. Fleischauer*, 74 Neb. 66 [103 N. W. Rep. 1084; 70 L. R. A. 301], there was a pond covering thirty-five to forty acres from which there was no natural outlet, the only way of escape being by evaporation or percolation. It was held that the defendant had the right to dig a ditch entirely on his own land through a slight rim or raise of land between the land and natural water way which led to plaintiff's land, thereby draining the water from the pond into the natural way upon his own land and across that portion of plaintiff's cultivated land which occupied the water way or depression. This right was sustained in the interest of good husbandry. See also *Todd v. Cass Co.* 30 Neb. 823 [47 N. W. Rep. 196], along same line.

In Minnesota the doctrine is carried to the extent of permitting the drainage if the resulting benefit to the upper property will be greater than the corresponding injury to the lower proprietor. *Farnham*, Waters p. 2625; *Sheehan v. Flynn*, 59 Minn. 436 [61 N. W. Rep. 462; 26 L. R. A. 632]. In draining a marsh by deepening the outlet he will not be liable to the owner, even if, in unusually heavy rains, such waters are more liable to overflow meadows because of such improvement. *Gilfillan v. Schmidt*, 64 Minn. 29 [66 N. W. Rep. 126; 31 L. R. A. 547; 58 Am. St. Rep. 515].

And again there is a class of cases that permits ponds to be filled up without liability, which is tantamount to draining them. *Peck v. Herrington*, 109 Ill. 611 [50 Am. Rep. 627]; *Gregory v. Bush*, 64 Mich. 37 [31 N. W. Rep. 90; 8 Am. St. Rep. 797]; *Yerex v. Eineder*, 86 Mich. 24 [48 N. W. Rep. 875; 24 Am. St. Rep. 113]; *Launslein v. Launstein*, 150 Mich. 524 [114 N. W. Rep. 383; 121 Am. St. 635].

In Iowa it is held that a pond may be drained at the point of overflow from a pond in times of freshets, if he does not discharge the water upon the land below him at a different place or at a greater quantity than before the ditches were made. *Dorr v. Simerson*, 73 Iowa 89 [34 N. W. Rep. 752].

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west * * *. The witnesses that have known the premises longest * * * speak confidently of the existence of the divide, and as to the natural outlet of the water that accumulates west of it, on defendant's land * * *. There is no doubt but that at seasons of the year when the water is unusually high in the ponds or sloughs, on defendant's land, caused by unusual rainfalls or sudden melting of large bodies of snow * * * the waters flow over the alleged divide to the east and escape in that direction. That seems to be the exception, and not the rule."

In *Erhard v. Wagner*, 104 Minn. 258 [116 N. W. Rep. 577], there was no natural outlet or drainage for the waters accumulating in the marsh, except when they became excessively high, the surplus then flowing off in a southerly direction. The lands of plaintiff were separated from the marsh on defendant's land by a natural watershed, forming a barrier and protection to plaintiff's land from the waters from the marsh. The court held that the doctrine of *Sheehan v. Flynn*, *supra*, to the effect that a party may connect by ditch a depression on part of his land with another depression and watershed also located on his own land, does not apply nor justify an upper proprietor in cutting across a watershed and thus deliver the water into another watercourse to the damage of property contiguous thereto.

That case presents a situation similar to the one at bar; the water in the basin in the case at bar under normal conditions is not governed or controlled by the same watershed as that portion of the general basin and of the field lying beyond the rim of the pond and between it and the culvert leading to plaintiff's land.

The only normal drain there is from the general basin in the field of defendant is in the western portion thereof, the surface water passing off in a northwesterly direction toward the road and northerly towards the Brown land.

The facts in this case, therefore, do not warrant the application of the doctrine set forth in the *Pontifical College v. Kleeli*, *supra*, that "in the control of surface water on the land of the upper proprietor, he has the right to cut ditches or lay tile to such watercourse on his own land for the purpose of carrying off the surface water within its watershed or the territory which

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contributes to the supply of the stream on his land, at least up to the capacity of the stream."

The conditions in the case of *Lambert v. Alcorn*, *supra*, before referred to, presents the only similar situation to be found in any case tending to support the contentions of defendant.

The right of the defendant in this case to drain the pond, if sustained at all, can be based only upon the theory that because in times of unusual freshets the overflow therefrom passes off in the direction of the marked depression, leading to the culvert, crossing the road upon plaintiff's premises, and that, therefore, it may be said that defendant should have the right to drain it all off, emptying the pond.

But under the facts in this case absolute justice between the parties will not permit accession to such a proposition, because we are governed by the civil law as to surface waters; and because the basin on defendant's land under ordinary normal conditions is not in reality in the same watershed with the lower portion of his field lying contiguous to the land of plaintiff; and for the further reason that the raise in the land constituting the rim of the pond operates as a barrier preventing a normal flow or outlet from the pond; and because though in times of extraordinary rainfalls there is an overflow, still there is no watercourse or channel leading immediately from the rim or barrier, through which such overflow will run, the water instead running in a diffused condition it comes into a well defined depression commencing within 100 feet of the road; and lastly because the water which passes from a portion of the general basin containing the ponds is not sufficiently high to pass over the barrier, passes out or flows in a northwesterly direction towards Brown's and the road. That is, in and around the pond that sometimes forms in the north part of the field, the surface water goes to the north and northwest.

And finally it must be concluded that in some respects the decision in *Butler v. Peck*, 16 Ohio St. 335 [88 Am. Dec. 452], is a definite authority which must be followed in a case of this nature.

The conditions in that case are like those in this. On the tract of the upper proprietor was a low marshy sink or pond,

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usually filled with a large quantity of water covering some five or six acres of land; at certain seasons of the year the water stood to a great depth, and at other times stood to the depth of from one to six inches, until it passed off through its natural outlet, or till it evaporated away and passed off by percolation through the soil; the natural outlets would not, of themselves, take all of the water off; on the north side of the basin, there was a small ridge, across which, through a settle or sog, swale or outlet, the water passed off in a northwesterly direction, over the surface, across the lower end of the land of defendant, on to the land of plaintiff; the water also, in very high times, broke out of the basin, and passed in a northeasterly direction around the end of the ridge, and came back on the land of defendant, and came across plaintiff's land.

The general surface drainage of several hundred acres of land, including that of defendant, was in a northwesterly direction across the lands of plaintiff.

The defendant dug a ditch in the settle or sog, swale, or outlet, across the small ridge, and later widened, deepened and extended it through the low and wet piece, cutting several collateral ditches, which brought the water from such low, wet piece of land into the main ditch, so that all the water that accumulated on this low, wet piece was carried down this ditch to within twenty rods of defendant's north line, where the ditch terminated, and the water was discharged upon the surface on the "defendant's" land, and left to seek its own natural flow and course over the surface; and that the water which passed down the ditch, did pass in its natural flow and course, over the surface in a northwesterly direction, across the lower end of defendant's land and onto the land of Diedrick, and thence on to the land of plaintiff.

"The sole question" say the court, "is this: Whether an owner of land having upon it a marshy sink or basin of water, which basin, as to a considerable portion of the water which collects within it, has no natural outlet, may lawfully throw such water, by artificial drains, upon the lands of an adjacent proprietor? We are clear that no such right exists. It would sanction the creation, by artificial means, of a servitude which

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nature has denied. The natural easement arises out of the relative altitudes of adjacent surfaces as nature made them, and these altitudes may not be artificially changed to the damage of an adjacent proprietor. And it makes no difference that, in the hypothetical case on which the charge of the court below complained of is based in times of high water a portion of the waters of the basin would overflow its rim, and find their way along a natural swale to and upon the lands of the plaintiff below; for, as to those waters which naturally could not surmount nor penetrate the rim of the basin, but were compelled to pass off by evaporation or remain where they were, the case is the same as if the basin had no outlet whatever."

So it was held that an upper proprietor could not cut through the rim of the pond, and let out the water remaining therein after the passing off of the overflow, and which has no outlet, but must pass off by evaporation and percolation.

And this is the exact question in the case at bar and the same holding is made.

But it may be contended that *Butler v. Peck*, *supra*, is nearly half a century old, and that good husbandry does not justify keeping these ponds standing on the farm of the defendant gradually seeping into the field and making it unfit for cultivation, and that the general welfare demands advancement, progress and industry in agriculture. To such a proposition we heartily agree. The law has provided a way by which plaintiff may have relief.

In a case like this the defendant may have (and should have) proceeded for the establishment of a township ditch, Gen. Code 6606, or for the construction of an underground drain.

Under the law of this state applicable to the situation of the defendant, he has no right to construct a drain on his own land, and empty the ponds in his basin, the water in which but for by the hand of man will not flow upon the lands of plaintiff.

That being so under Gen. Code 6653 it being necessary for defendant to enter upon the lands of plaintiff with the drain which he has started to construct to carry off the permanent accumulation of water, he "must continue said underground drain to such place for an outlet as will not damage said lands

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(of another) by the water emptying thereon. He may be permitted to use the lands of plaintiff as an outlet for the water from his ponds under conditions named in Gen. Code 6654. If defendant and plaintiff can not agree the way to proceed is pointed out by Gen. Code 6655.

Counsel for defendant strenuously insists that the law does not compel him to take this course, but that he may cast off this extraordinary amount of water, which, but for his hands in constructing the ditch or drain would not go there.

It is not necessary to discuss the merits of the two systems of law—civil and common law—touching this subject. It is sufficient to know that the rule of the civil law being regarded as the most just and equitable, has been the rule in this state for many years.

The civil law acts upon the maxim that water is descendible by nature, and that its usual flow should not be interfered with, so that its burden, if it be one, should be borne by the land where it naturally flows, rather than by land where it can only be made to flow by artificial means. *Crawford v. Rambo*, 44 Ohio St. 279 [7 N. E. Rep. 429].

The civil rule will not permit a man who owns a farm on which is located a field which is not so valuable for agricultural purposes because of the presence of permanent ponds, as is the land of his lower neighbor who has a blue grass field, to cast off large quantities of water which nature puts and keeps in the basin of his field upon the much more valuable field of his neighbor without doing it in the regular way under the drainage law, and such rule is concededly more just and equitable than the common law rule which permits such owner to treat the surface water thus accumulating as an enemy and to cast it upon his neighbor in order to protect his own premises. That would be making his own premises valuable at the expense of his neighbor.

It is not necessary to prove actual injury in an action to enjoin the maintenance of a ditch. *Jacobson v. Van Boening*, 48 Neb. 80 [66 N. E. Rep. 903; 32 L. R. A. 229; 58 Am. St. Rep. 684].

The finding and decree is in favor of plaintiff.

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TELEGRAPHS AND TELEPHONES.

[Franklin Common Pleas, May 12, 1913.]

SIDNEY TELEPHONE CO. v. PUBLIC SERVICE COMMISSION OF OHIO.

Telephone Line Operating Prior to Enactment of Public Utilities Act not Limited to Liens Constructed Before Passage.

Act 102 O. L. 549, Sec. 54 (Gen. Code 614-52) passed May 31, 1911, and taking effect July 1, 1911, that no telephone company shall be permitted to exercise any right of franchise where another company is giving adequate service unless it first secures a certificate from the Public Service Commission authorizing such exercise, does not operate retrospectively and apply to a company organized and incorporated to do a telephone business in a certain county and operating local telephone lines and exchanges at the county seat and adjoining towns, prior to said July 1, 1911, nor prevent it from extending its lines therein and in other towns thereof in which an older and larger company is operating and maintaining telephone lines; hence, the state public utilities commission, granting such extension rights acts reasonably and its certificate granting additional rights of extension will not be vacated.

[Syllabus approved by the court.]

A. J. Hess, for plaintiff.

Hon. T. S. Hogan, Atty. Gen., and *J. D. Barnes*, for defendant.

BIGGER, J.

This action is brought by the plaintiff under and by virtue of Gen. Code 614-69, seeking to obtain the vacation of an order of the commission granting to the Farmers Telephone Company a certificate under the provisions of Gen. Code 614-52.

It appears from the evidence, that the Sidney Telephone Company was incorporated some years ago and has a central station in the city of Sidney with lines extending generally throughout the city, and pretty generally throughout the county of Shelby. In 1910 the Farmers Telephone Company was organized and incorporated to do a telephone business in the county of Shelby and adjoining counties, and it has lines in operation in a portion of the city of Sidney, and also covering, to some extent, the rural sections of the county of Shelby. Its lines are not, however, so extensive as those of the Sidney Telephone Com-

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tral station, and before the work of construction had proceeded to that point where its telephone wires and instruments were installed, the act here in question took effect. Was it the legislative intention that its investment should be destroyed or greatly impaired by the provisions of this act? Was it the legislative intention that its securities, whose value must depend upon the exercise of the rights and privileges granted, should be rendered worthless, or their value greatly impaired? A construction which would lead to such results should not be put upon the statute unless the language plainly requires it.

The Supreme Court of this state in the case of *Kelley v. Kelso*, 5 Ohio St. 199, announced this rule of statutory construction which has been frequently cited with approval since: "Statutes affecting substantial interests and rights of property have a prospective operation only, unless the contrary intention clearly appears." Judge Ranney in that case quotes with approval the language of the court in *Quackenbush v. Danks*, 1 Denio (N. Y.) 130:

"There is nothing in the statute under consideration which, either in terms, or by necessary implication, makes it applicable to the case in hand. And we ought, in decency, to conclude that the legislature did not intend it should have the retrospective and unjust effect which is claimed for it by the plaintiff."

Of course, it is true that, except as restrained by the federal and state constitutions, the legislature may enact statutes having a retrospective operation, but they are not to be so construed unless such intention clearly appears. And this is especially true where such a construction would work injustice.

While this Sec. 54 is given a retrospective operation it is but very limited in extent, and under the rule stated, is not to be extended unless by necessary implication. To apply it to those companies which had in good faith exercised their right to own and operate a plant, so as to prevent them from making extensions of that plant after the passage of the act would be clearly to extend it by implication, which is not necessary in this case. It is apparent that the language of this statute was carefully chosen. It is not the province of the court to add

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provisions to it, which were not put there by the legislature and which it seems clear from the carefully chosen language was not intended to be there.

Counsel for the Sidney Telephone Company lays great stress upon what is claimed to be the clearly announced policy of the state in this section, namely, to prevent duplication of telephone plants in the same municipality or locality in the interest of the subscribing public. It is argued that it is the duty of the court to give effect to this object and purpose of the legislature. The object and purpose of the legislature should be given effect and it is given effect when the statute is applied in accordance with its plain terms to those corporations organized after the act and those organized before, but not having yet exercised their privilege or franchise to own or operate a plant. All such corporations before exercising their grant or franchise in any municipality or locality where there is a telephone company rendering adequate service must apply for and obtain the certificate provided for by this act. But where a company had obtained its franchise before this act took effect, and had exercised that franchise by establishing a plant, it is plainly not within the express terms, and in my opinion not within the object and purpose of the law. Such a public utility as a telephone or gas or waterworks is sometimes denominated a natural monopoly. Where such public utilities are duplicated the cost of such duplication must necessarily be borne by the subscribing public. It may be doubtful whether this principle is so clearly applicable to a telephone company as to a gas plant or waterworks, as it is admitted by counsel for plaintiff that as the number of subscribers or users increases, the relative cost increases, so that the point may be reached where the cost to the subscriber of two telephones may be offset largely or wholly by the increased cost due to the great number of users of the single telephone. But it may be conceded that there are other disadvantages to the subscribing public in the use of two telephones in the same municipality or locality which it was the legislative intention to prevent or restrict. Admitting that it will be to the advantage of the subscribing public to prevent the establishment of two telephones, and that this was the object

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and purpose of this enactment, the reason for this fails, where the two have already been used. The inhabitants of the county of Shelby are, as in every other county closely connected together for business and social purposes. No business man in any city where there are two telephones regards himself as wholly equipped for business unless he has both telephones. The same is true as to the villages and rural communities in a county which are intimately connected as a rule with the county seat. The one telephone is or may be as necessary as the other, and it is not apparent how the public are to be benefited by denying to them the advantages to be derived from connection with all the telephone users of the county. The advantages would be apparent provided there was but one company and all users are compelled to use the single telephone. But this end can only be attained where the grant or franchise of the second company has not yet been exercised.

As already stated, statutes may be made retrospective in their operation unless such operation will bring them into conflict with the federal or state constitution. The nature and extent of the limitations upon the legislature branch of the government under the reserve power conferred by the constitution to amend and repeal laws under which corporations are granted their franchises, is not very clearly established as yet. The reserve power to repeal has seldom been exercised; that to amend by imposing additional requirements which are in effect an amendment of the franchise more frequently. It has been apparently now settled that notwithstanding this reserve power the legislature, in its exercise, is also controlled by that other co-ordinate constitutional provision of the inviolability of private property and that amendments cannot be made which, in their effect, amount to a confiscation of property or the destruction or impairment of vested rights. This has been most frequently decided where, under this reserve power, it has been sought to impose amendments upon corporate charters by changing the rates of fare upon railroads, and it is now settled that rates cannot be made so low as to amount to confiscation of property. Just how that principle of limitation upon this reserve power is to be distinguished from the case of a telephone

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company which, in good faith, has established a plant, but has not reached a point in the extension of its system which will yield it sufficient revenue to enable it to successfully conduct its business, it is not easy to understand. Of course, I do not mean to say that the Farmers Telephone Company has not extended its system so that it is remunerative, but if the statute is to be given this construction, such results are likely to follow, and it should not be so construed as to lead to such result unless the language plainly requires it. Of course, if the statute here in question is to be construed as contended for by the Sidney Telephone Company, it clearly amounts to a change and amendment of its corporate grant which entitled it to construct its line generally throughout the county of Shelby.

I do not deem it necessary, however, to enter upon a discussion of the question of the constitutional right of the legislature to make such an act apply to the Farmers Telephone Company and others similarly situated, but only mention it in passing as presenting a question of probable constitutional difficulty, if the act is to be construed as contended for by the Sidney Telephone Company.

I am also of opinion that even if the act should be construed to apply to the Farmers Telephone Company, that it is not at all apparent that the Public Service Commission acted unreasonably in granting the certificate, and that upon the grounds already stated. The public convenience manifestly does not mean the convenience of every member of the public, because many do not use and probably never will become users of a telephone. But if any considerable number of the members of a community, having but one telephone, but closely connected for social and business purposes with another community which has two or more, desire to have those which have not yet been extended to them, I am not able to say that the finding by the Public Service Commission, that it is proper and necessary for the public convenience, that it or they be so extended, is unreasonable.

For the above reasons the conclusion is reached that the plaintiff is not entitled to the relief prayed for, and the petition is dismissed at the costs of the plaintiff.

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EMBEZZLEMENT.

[Franklin Common Pleas, May 14, 1913.]

STATE OF OHIO V. FRANK E. BAXTER.

1. Officer's Duty to Account and Failure to do so Constitutes Embezzlement.

The crime of embezzlement, proscribed by Gen. Code 12876, is accomplished by the absolute and fraudulent conversion of money by one in the position of trust. It is the accused officer's duty to account, together with his neglect or refusal to do so that constitutes the fraudulent breach of duty, and embezzlement. *State v. Bailey*, 50 Ohio St. 636, 646; *Campbell v. State*, 35 Ohio St. 70; *State v. Gunkleman*, 23 Dec. 535, affirmed, no op., *State v. Gunkleman*, 87 O. S. 000; 57 Bull. 488.

2. Use by State Superintendent of Banks of Funds in Bank in Process of Liquidation and Restoration Thereof not Complete Breach of Trust or Embezzlement.

Use by the state superintendent of banks, for payment of a private debt, of funds belonging to a bank which has been placed under his control for the purpose of liquidation, does not constitute a crime under Gen. Code 12876, if the funds so taken were soon afterwards returned to the depository together with interest thereon during the period of such use.

[Syllabus approved by the court.]

MOTION to direct verdict.

Timothy S. Hogan, Atty. Gen., *E. C. Turner*, Pros. Atty.,
H. S. Ballard, for plaintiff.

Kent Hughes, for defendant.

KINKEAD, J.

The charge made by the indictment is that Frank E. Baxter was at the time of the acts charged and until March, 1913, the duly appointed, qualified and acting superintendent of banks for the state of Ohio; that said Baxter as such officer of the state took charge of the affairs and assets of the Columbus Savings and Trust Company, and appointed as special deputy superintendent one Daniel H. Sowers to assist in the liquidation and distribution of the assets of that company; that all the property and assets of that bank came into the care, custody and control of the said Baxter as such superintendent of banks; that as part of the property of such bank there came into the hands of

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defendant as such officer cash money of the amount and value of \$37,000.

The indictment charges that within three years prior to the inception of this prosecution, the said Frank E. Baxter, unlawfully, did take from the assets of the said Columbus Savings and Trust Company cash money of the amount and value of \$37,000, and did then and there use said \$37,000 to pay and with said sum did pay a certain note made by said Frank E. Baxter and payable to the estate of John W. Gates and dated November 22, 1911, for the sum of \$37,000 payable May 22, 1912, six months from date; that said Baxter did then and there convert the said \$37,000 to his own use, the same being the property of the Columbus Savings and Trust Company, which sum of money so converted and used by the said Baxter had theretofore come into the possession, care, custody and control of said Baxter by virtue of his said office of superintendent of banks for the state of Ohio.

The opening statement of counsel for the state is as follows:

"The law requires that each side shall state its case and gives to each side the option of briefly stating what they expect the evidence to show.

"We shall combine both of these statements in one.

"The charge against the defendant, Frank E. Baxter, is fully set forth in the indictment which I shall read to you.

* * *

"We expect the evidence to show that at the time set forth in the indictment the defendant, Frank E. Baxter, was the duly appointed, qualified and acting superintendent of banks of the state of Ohio, an office of public trust and profit; that by virtue of his said office there came into the possession of defendant all of the assets, including large sums of money, of the Columbus Savings and Trust Company, a corporation incorporated for the purpose of and (until taken possession of by said defendant as said superintendent of banks) doing business as a safe deposit and trust company in the city of Columbus, Franklin county, Ohio.

"That pursuant to law the defendant duly appointed Daniel H. Sowers, special deputy superintendent of banks, to

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assist him, the said Frank E. Baxter, in the duty of liquidation and distribution of the assets of said the Columbus Savings and Trust Company.

"That pursuant to law and the orders of defendant, there were deposited on interest in the Citizens Trust and Savings Bank and in the State Savings Bank and Trust Company (both being state banks of deposit located in the city of Columbus, Franklin county, Ohio) in the name of Frank E. Baxter, as said superintendent of banks, large sums of money belonging to said the Columbus Savings and Trust Company which had come into the possession of said Frank E. Baxter by virtue of his said office.

"The evidence will further show that on November 22, 1911, the defendant had borrowed \$37,000 from the estate of John W. Gates for six months with interest at 6 per cent putting up as collateral 525 shares of the Texas Company, a Texas oil company.

"The note, with accrued interest amounting in all to \$38,110, fell due May 22, 1912.

"Shortly before this the defendant had made unsuccessful efforts to borrow sufficient money upon this collateral from banks under his supervision to take up this loan, one bank giving him a final answer on Sunday, May 19, 1912.

"Some time in May, 1912, the defendant instructed Daniel H. Sowers that he intended opening up another bank account for funds of the Columbus Savings and Trust Company.

"On May 20, 1912, the day following the final answer given him by the Citizens Trust and Savings Bank that it would not loan to exceed \$25,000 upon the collateral, the defendant called Sowers by telephone from Lima and instructed Sowers to withdraw \$20,000 of the Columbus Savings and Trust Company funds from the State Savings Bank and Trust Company and \$17,000 of the same funds from the Citizens Trust and Savings Bank, to obtain therefor New York drafts payable to the Bankers' Trust Company of New York, and mail the drafts to him, Baxter, at Lima. Sowers carried out these instructions, thinking Baxter was going to open up another bank account for the funds.

"Baxter received these drafts late Monday afternoon and

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mailed them immediately to the Bankers' Trust Company of New York for the purpose of taking up his \$37,000 note to the Gates' estate. Accompanying these drafts Baxter sent the following letter which is self-explanatory:

'Samuel A. Baxter's Sons,

Lima, Ohio,

Lima, Ohio.

May 20, 1912.

'Bankers' Trust Co.,

New York, N. Y.

'Gentlemen:

'Herewith I hand you exchange as follows:

'Importers & Traders National Bank	\$20000.00
'Standard Trust Company	17000.00
'Seaboard National Bank	1110.00
	<hr/>
	\$38110.00

'These drafts are made to your order and I request that you use the proceeds towards taking up my note, payable at your bank, described as follows:

'“F. E. Baxter maker, payable to the estate of John W. Gates, dated November 22, 1911, \$37000.00 with 6 per cent interest from date, payable May 22nd, 1912 (6 months from its date) and secured by 525 shares of stock of 'The Texas Company.' ”

'Upon proper cancellation of the above described note and return of collateral, please pay this money over and return note and collateral to me.

'Very truly yours,

(Signed F. E. Baxter.)'

'“The Bankers Trust Company did as requested and, after applying those drafts to the private indebtedness of Baxter, forwarded Baxter the 525 shares of The Texas Company.

'“Mr. Sowers did not see Baxter for about a week. The first time Baxter said nothing about the matter. About ten days after Baxter had taken this money Sowers spoke to him about it and he told Sowers that he had taken the money and paid an obligation in New York to secure certain collateral that

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he, Baxter, had there in New York. Baxter further said that he would have the money back in a day or two. In a day or two Baxter came to Sowers and said 'I have that collateral that I got in New York and I will turn it over to you for your protection.' Sowers refused to accept the collateral.

"After some negotiation Baxter succeeded on June 5, 1912, in borrowing \$42,000 from the Ohio National Bank of this city upon the 525 shares of stock. The Ohio National Bank gave to the defendant as proceeds of the loan one certificate of deposit for \$17,000 and one certificate of deposit for \$20,000 and another certificate of deposit for \$5,000.

"On June 6, 1912, Baxter turned over the certificates of deposit for \$17,000 and \$20,000 to Sowers, and for the purpose of covering up the transaction as much as possible, as we shall expect the evidence to show, instructed Sowers to deposit the one for \$20,000 in the State Savings Bank and Trust Company on that same day and to deposit the one for \$17,000 in the Citizens Trust and Savings Bank later. Accordingly, Mr. Sowers did deposit the \$20,000 certificate in the State Savings Bank and Trust Company to the credit of Frank E. Baxter as superintendent of banks on June 6, 1912, and Sowers also deposited the certificate of deposit for \$17,000 in the Citizens Trust and Savings Bank to the credit of Frank E. Baxter, as superintendent of banks, on June 8, 1912.

"Sowers, at a loss to know how to account for the \$37,000 on his books from its withdrawal on May 20, 1912, until June 6th and 8th of the same year, carried it as two 'cash items.'

"The evidence will show that Baxter paid to the fund interest on the money which he had converted to his own use at the rate of 3 per cent per annum. But the evidence will also show that no order of court was ever taken authorizing any loan of any funds to Baxter or any one else.

"In brief, the evidence in this case will show beyond all reasonable doubt that the defendant, Frank E. Baxter, converted to his own use \$37,000 of the funds of the Columbus Savings and Trust Company which had come into his possession by virtue of his office as superintendent of banks of the state of Ohio."

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The question is whether the fact that the defendant having received the money of the Columbus Savings and Trust Company by virtue of his appointment as state superintendent of banks and took \$37,000 thereof, and used the same to pay his personal obligation as alleged, the money having been kept and used by him for the period mentioned in the statement of counsel, when he returned the same to the banks where it had been on deposit, constitutes a crime under the provisions of Gen. Code 12876.

The problem is whether a conversion of the funds of the bank for the personal use of the defendant for a temporary period such as is shown by the statement of counsel, and not permanently, constitutes the crime of embezzlement under the statute. Gen. Code 12876 provides that:

“Whoever, being elected or appointed to an office of public trust or profit, * * * embezzles or converts to this own use, * * * anything of value that shall come into his possession by virtue of such office * * * is guilty of embezzlement.”

The whole question rests upon the construction and meaning of the language “embezzles, or converts to his own use.”

The origin and history of all statutes relating to the crime of embezzlement will shed much light upon the meaning and construction of the statute, and its language, by virtue of which the indictment in this case is framed.

In the first place it is well understood that the common law crime of larceny left gaps through which, in the expansion of business, many wrongdoers escaped. The statutory crime of embezzlement was first enacted in England to cure these defects, followed by enactments in all of the states in this country. The American statutes followed those of England. These statutes were enacted to make penal two phases or characteristics of wrongful acts not previously made penal by common law. If a servant, officer, or other trustee steals the property of his principal, or fraudulently or wrongfully converts the same to his own use, this is made penal by the new statutes, he being guilty of embezzlement.

Many expressions are found in judicial opinion to the effect that embezzlement is a species of larceny, *United States v.*

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Lee, 12 Fed. Rep. 816; that it is a statutory expansion of common law larceny made to prevent a failure of justice that would occur under the technical rules which the law applied to larceny. *State v. Collins*, 4 N. Dak. 433 [61 N. W. Rep. 467]. While this is true, we must not allow ourselves to lose sight of the absolute distinction between the two relationships which exist between the parties, when the two crimes are committed. In larceny the initial act is a trespass, while in embezzlement there is a breach of trust, the nature and extent of which depends upon the contractual or statutory duties. While there is slight variance in language in different statutes prescribing the crime of embezzlement, it must be conceded that the purpose and intent of all of them is to make criminal, willful, unlawful or fraudulent conversions by persons to whom property has been lawfully confided by some relation of trust and confidence.

As in the kindred crime of larceny the word "steal" was used as descriptive of a felonious taking and carrying away of the goods of another, so is it conceded that the corresponding words "embezzle" and "converts to one's own use" were found in embezzlement statutes as descriptive of an unlawful, fraudulent conversion of property by one to whose care and custody it is committed by the owner.

Looking to the statutes in Ohio, the first embezzlement statute was passed and took effect March 18, 1839, 37 O. L. 74, and was made applicable to private relationships, embracing individuals and corporations. The terms used therein were "whoever shall embezzle or convert to his own use, or fraudulently take, make way with, or secret with attempt to embezzle or fraudulently convert to his own use," etc. It might be observed that the word "embezzles" expresses all that is used in that statute, the remaining being descriptive of the same kind of an act as the words which follow, unless it be to "secrete with intent to embezzle." The same language has been used in the statute throughout its history, and today Gen. Code 12467 provides:

"Whoever embezzles or converts to his own use, fraudulently takes or makes away with, or secretes with intent to embezzle or convert to his own use," etc.

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What is now Gen. Code 12873 (the public officer statute) was first enacted March 2, 1846, 44 O. L. 112, (S. & C. 1286). From the beginning this act made it embezzlement for "any officer elected or appointed * * * or of any agent or servant of this state (to) convert to his own use, in any way whatever, or who shall use, by way of investment, etc., or shall make way with or secrete any portion of the public moneys," etc. Originally by this act it was unlawful to loan out any public money. The penalty for the loaning was by fine. When the independent treasury act was passed April 12, 1858, what is now Gen. Code 12873, and which was originally enacted March 2, 1846, became Sec. 15 of that act, its provisions being precisely those of the present statute; and the existing Gen. Code 13674, the so-called *prima facie* evidence statute, was enacted at that time and now applies exclusively to Gen. Code 12873 by its terms and provisions. In some ways, under certain language of Gen. Code 12873, the rule of evidence prescribed by Gen. Code 13674 will apply to other classes of embezzlement. Indeed, the rule enacted by Gen. Code 13674 may be said to be the rule in absence of statute in the common type of embezzlement.

In the evolution of the statutes, we have Gen. Code 12876 which was separated from the other statutes, leaving Gen. Code 12873 to apply exclusively to public officers handling public moneys; while Gen. Code 12876 was designed to apply to all persons who are elected or appointed to an office of public trust who handle money not strictly public, though in some instances it may be; and it was intended to take the place of other statutes theretofore existing, concerning officers elected or appointed which were scattered throughout the statutes.

It is to be noticed that the language of Gen. Code 12876 more strictly comports with that of Gen. Code 12467 relating to private embezzlement.

The money coming into the hands of the superintendent of banks by virtue of his appointment, is not public money as is that which is paid into the state treasury or to the secretary of state. It is in fact private funds. It belongs to the depositors and stockholders of the Columbus Savings & Trust Company, but that is of no consequence except to refute the claim that was

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made in argument concerning the provision of the statute with respect to the care of public moneys.

The question here is the meaning of the words "embezzles or converts to his own use."

The primary signification of the word "embezzle" according to standard dictionaries is that it means to appropriate or divert fraudulently to one's own use, as money intrusted to one's care or control; apply to one's use in breach of one's trust; to misappropriate secretly; purloin. See, *State v. Trolson*, 21 Nev. 419 [32 Pac. Rep. 930].

It is to appropriate or divert falsely to one's own use. *Grin, In re*, 112 Fed. Rep. 790. It means to appropriate fraudulently to one's own use; to apply to one's private use by a breach of trust. *State v. Sullivan*, 49 La. Ann. 197 [21 So. Rep. 688; 62 Am. St. Rep. 644].

Embezzlement is the fraudulent removing and secreting of personal property intrusted to one. *People v. Belden*, 37 Cal. 51. Bouvier Dictionary; *Fagnan v. Knox*, 40 N. Y. Super. Ct. 41; *Foster v. State*, 2 Penn. (Del.) 111 [43 Atl. Rep. 265].

It means a felonious appropriation; and where the word "embezzlement" is used in a statute, it is construed in its technical signification; it has a technical meaning. *United States v. Greve*, 65 Fed. Rep. 488; *Wall v. State*, 56 So. Rep. 57 (Ala.). It is defined as an act of fraudulently appropriating to one's own use what is intrusted to the party's care and management. *Chaplin v. Lee*, 18 Neb. 440 [25 N. W. Rep. 609]; *State v. Yeiter*, 54 Kan. 277 [38 Pac. Rep. 320]; 3 Words & Phrases 2351. See McClain, Crim. Law Secs. 621, 622; Bishop, Crim. Law Sec. 325. See also *Mitchell v. State*, 11 Circ. Dec. 446 (21 R. 24).

The use of the words "convert to one's own use," "embezzle" or "embezzlement" contemplates a wrongful conversion. "Conversion" is an unauthorized assumption and exercise of the right of ownership over goods, belonging to another, to the alteration of their condition or the exclusion of the owner's rights. *Penny v. State*, 88 Ala. 105 [7 So. Rep. 50]; *Conner v. Allen*, 33 Ala. 515.

To constitute an appropriation or conversion, there must

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be a secretion, a destruction, or wrongful taking. In the sense used in tort, conversion is the appropriation of a thing to one's own use and beneficial enjoyment, or its destruction, or in exercising dominion over it, in defiance of the right of the owner, or withholding the possession from the owner. 2 Words & Phrases 1562.

The use of the words, "embezzles" or "converts to his own use," are both meant to convey the same thought or idea, that anyone sustaining a relation of trust and confidence shall fail to maintain and keep the subject of the trust according to the terms and conditions, or according to the law regulating the same.

Under the common law, if one acquiring property lawfully converted it to his own use, he could not be punished for larceny.

A positive and conclusive definition of the crime of embezzlement is furnished by the Supreme Court as follows: Where * * * the crime has been accomplished by the *absolute* and *fraudulent* conversion of the money of the employer to the use of the agent * * * completes the offense." *State v. Bailey*, 50 Ohio St. 636, 646 [36 N. E. Rep. 233].

There is no crime without a criminal intent, save one or two; and we must distinguish between the so-called common intent in crime, and that class of crimes where the specific intent is an essential ingredient, and this crime is one where there is no specific intent, but it may be designated as a common, ordinary criminal intent that follows from the unlawful commission of the act charged. A proper understanding of *Mitchell v. State*, *supra*, strongly urged in argument, does not sustain a contrary view, the question there being simply whether intent should be averred in the indictment. Of course in cases of specific intent, it need be; in others, not. The conclusion must be that the two statutes, Gen. Code 12467 and 12876, prescribe the same kind of a crime, with the same characteristics and elements, and cases coming under either must measure up and pass the same tests.

In fact, it seems true also that at least one provision in Gen. Code 12873, in so far as it prescribes the crime of converting

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public moneys to one's own use, which constitutes embezzlement, prescribes the same crime of embezzlement in respect to public moneys as is found in Gen. Code 12467 and 12873. Reading the words "converting to one's own use" with those constituting such act of embezzlement; considering the word "embezzlement" as used in the latter part of that section in its technical sense and meaning, as we must do, the conclusion must be that it makes the act of converting public money to one's own use embezzlement, thus prescribing the same crime with the same element and characteristics as do each of the other statutes.

Attention, however, is thus directed to only part of the provisions of Gen. Code 12873, for the sole purpose of showing that the state has enacted an embezzlement statute covering private relations, official relations, where the money comes into the hands of persons elected or appointed to an office of public trust, and lastly, to public moneys received by persons charged with the collection, receipt, safe-keeping, transfer, or disbursement thereof, which belongs to the state and other public agencies.

There seems to be no reasonable ground of contention against this classification, the only point where controversy might be raised being in respect to the language in Gen. Code 12483. But certainly the fact that there are three separate statutes prescribing separate crimes for each kind of relationship, is cogent evidence of the general purpose and intent of the statutes.

This statement of the general policy of the state is made only for the purpose of deriving what aid, if any, may be drawn, from cases arising under any of the statutes, as well as from the general policy of legislation.

While not expressing any final view under the particular portion of Gen. Code 12873 mentioned, and particularly not having in mind any other portion of that section than the one now here mentioned, the reason for referring to it at all being merely to call attention to some things that have been stated in reference to it by certain decisions.

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Let us further consider the constituent elements of the crime of embezzlement. They are the following:

1. There must be a breach of a duty or trust in respect to money, property or effects in the party's possession belonging to another.

2. There must be a wrongful or fraudulent appropriation thereof by the person charged, to his own use.

3. The intent follows as matter of presumption or inference of fact from the wrongful conversion.

What constitutes a wrongful conversion must depend entirely upon the duties required by reason of the trust or contractual relation or statutory obligation or duty. For example, if an agent collects money and converts it to his own use and fails to turn the same over to his principal within the time he ought to do so, or is required to do, the duty is violated, and the crime is then complete. Nothing he may do thereafter can eradicate the crime.

If, on the other hand, his contractual obligation is such that he is required to pay or account only within thirty days after its collection, and he uses the money, but later secures other money and performs the duty according to contract, and pays it to his principal according to his duty and obligation, he has not been guilty of a breach of his contractual duty, nor has he committed a crime, although he may have committed a moral wrong. The intent which he had when he temporarily converted it to his own use, may have been to make good his contract and perform his obligation. We cannot then, it seems clear, apply to such situation the rule of law prevailing in larceny, where there is a wrongful taking by trespass, and the crime is complete in such case though the money was afterwards returned.

This simple illustration seems clearly to point out the distinction between larceny and embezzlement, and to show how it requires a conversion in the latter crime, such as will unqualifiedly show a complete breach of duty or trust according as the latter may be prescribed.

So, take it in the case at bar. By statute it was made the duty of Baxter, as superintendent of banks, to take charge of

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the money of the Columbus Savings & Trust Company, and to deposit it in banks, as prescribed in Gen. Code 742-6 (enacted, 101 O. L. 277). It was furthermore made his duty by law at a certain time, as prescribed in Gen. Code 742, that he, as "superintendent of banks may" (of course, that means "shall") "out of the funds remaining in his hands after the payment of expenses, declare one or more dividends, etc., such dividends to be paid to such persons and in such amounts and upon such notice as may be directed by the common pleas court." Before that time was reached, however, in the administration of his trust, he had taken out of the banks the amount named in the indictment, and had used it in the payment of his own debt; and within a short time thereafter he repays the amount so taken, with interest. If he had continued in the office to the present time, the money would have been there with which to pay the dividends according to the statutory duty imposed upon him.

Then is it not clear that he has not made such a wrongful and fraudulent appropriation as constituted a complete legal breach of his trust, and the duties thereof, which is the essential requisite of the crime of embezzlement? He may, as in the simple illustration of the agent, have committed a moral wrong; but not a crime as it has existed for so many years. And if it is to be considered a crime, it is for the legislature, and not for the court to so prescribe.

Stealing with the proper intent for even a short time is the rule in larceny, because that was the common law conception. But temporary wrongful appropriation in embezzlement will not constitute the crime if when at the time fixed for the performance of the duty of accounting is at hand, the same is fulfilled.

When the conversion is made complete by failure to perform the duty at the fixed time, the crime is then complete, and repayment will not atone for it. It will be discovered on examination that the cases concerning the inefficacy of repayment to wipe out the crime, are those where there has been a clear breach of duty when the crime is complete. The case of *United States v. Gilbert*, 4 O. F. D. 251, cited by the state, is an il-

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illustration of such rule. A postmaster must have the money on hand at all times and especially when an inspector comes to make an examination. If it is not there at that time, the crime is complete and repayment will not be effective.

As held in the recent case of *Robinson v. Commonwealth*, 104 Va. 883 [52 S. E. Rep. 690]:

"The restoration of public funds embezzled by an officer cannot relate back so as to efface the prior completed crime."

In fact the cases are numerous on this point.

In the Magly case, referred to in argument, the inspector walked in and found the shortage, and repayment would not wipe out the crime under the statute. So has the rule above stated been clearly shown in the embezzlements in the cases of private relationship by the cases of *Myers v. State*, 2 Circ. Dec. 712 (4 R. 570), and *Young v. State*, 26 O. C. C. 747 (6 N. S. 53), *affirmed, no op.*, *State v. Young*, 73 Ohio St. 372, which rule is conceded in argument by the state. I simply need to call attention to the distinctions drawn in these cases between the classes of embezzlement of public moneys and private funds, for purposes of illustration, of certain phases of the statute, but refrain from expressing any opinion in respect to the classification and the distinction there made, and concerning what is said by the court in one of the cases cited, in this connection.

I may also in like manner refer to the reasoning of Judge Ranney, in *State v. Buttles*, 3 Ohio St. 309, where a similar distinction was drawn, and the view of the court there expressed concerning the general policy and purpose of the statutes.

State v. Gunkelman, 23 Dec. 535 (13 N. S. 665), in which the treasurer of the board mingled the public money with his own; and when he drew certain checks upon such combined funds in payment of his own debts, the same were paid, the result being that he drew on the funds of the board of education and used the same in the payment of his obligations. But it is not disclosed that he knew he was overdrawing. By the application of Gen. Code 13674, the trial court ruled that the treasurer could be held for conversion only where there has been a default, or where there has been a failure or refusal to pay over or to pro-

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ment. The fallacy of the plaintiff's position is in the assumption that the only act of embezzlement is in paying out of the money by the agent for his own use. Suppose he had retained the money in his own possession and had merely refused to account, the crime would have been complete; while, on the other hand, if the money had been expended and he had accounted at the proper time with his employer by the payment of other money of equal value, no offense would have been committed.

I need only add in conclusion that the court follows what seems to be the well settled rules of construction of the statute as well as the fundamentals of the crime of embezzlement, and also the rule of strict construction which applies in criminal statutes; and as has been observed in other cases, the long silence and acquiescence in the conception that a complete breach of the trust relations and duty, whatever it may be, under particular circumstances, is necessary to constitute the crime in our opinion, bespeaks for the soundness of the conclusion reached in this case. If there is not a remedy for what may be regarded as a moral wrong in such case as this, it is for the legislature to create one and not for the court.

For the reasons stated, gentlemen of the jury, you are now directed to return a verdict in favor of the defendant.

DESCENT AND DISTRIBUTION.

[Medina Common Pleas, July 19, 1913.]

LEE ELLIOTT, ADMR. V. DANIEL SHAW, ET AL.

1. A Devise of Residue "According to the Laws of Inheritance" Implies Distribution as of Intestate Property.

A testator who provides: "All the remainder of my estate I desire shall descend and pass according to the laws of inheritance of the state of Ohio," intends that the residue of his estate shall be distributed the same as the property of an intestate would be distributed.

Elliott v. Shaw.

2. On Distribution to Nieces, Nephews and Children of Deceased Nieces, Children Take Per Stirpes Distributive Share of Deceased Parent.

Where such testator left surviving him two nephews and one niece and children of two other nieces, the residue of his estate will be divided in five parts of which the two nephews and the niece will take *per capita*, each getting one-fifth and each set of children of the deceased nieces will take by representation *per stirpes* one-fifth, to be equally divided among them as prescribed by Gen. Code 8582, 8583.

[Syllabus by the court.]

Frank Heath, for plaintiff.

DOYLE, J.

The plaintiff asks the order and direction of the court as to the manner of distributing the residue of the personal estate of James C. Johnson, deceased, of whose estate plaintiff is administrator with the will annexed.

The third item of the will provides: "All the remainder of my estate I desire shall descend and pass according to the laws of inheritance of the State of Ohio."

Johnson left no wife nor lineal descendants. He had had a brother and sister, both of whom were deceased leaving issue. The brother left two children living, a son and a daughter, and two grandchildren who are the issue of a deceased daughter, and the sister left one son living and two grandchildren who are the issue of her deceased daughter.

These two nephews and one niece and four children of the other two nieces are under the laws of inheritance of Ohio entitled to the residue of the estate of the testator, under the third item of his will.

The sole question presented is in what proportion do they share in the residue.

By the statute law of Ohio (Gen. Code 8578 and 8584), the personal property of an intestate is divided in the manner provided for dividing real estate as provided in Gen. Code 8574, 8581, 8582 and 8583.

Paragraph 3 of Gen. Code 8574 provides: "If such intestate leaves no husband or wife, relict to himself or herself, the estate shall pass to the brothers and sisters of the intestate of the whole blood, and their legal representatives."

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The decedent Johnson is not an intestate, but his intention, which is the sole guide in the construction of his will, was that the residue of his estate should be distributed according to the laws of inheritance of the state of Ohio. An inheritance is the right to succeed to the estate of a person who dies intestate. Hence, there being nothing before the court to show the testator's intention but this third item of his will, the court is, by his direction, constrained to treat the residue of his estate, so far as the manner of its distribution is concerned, as though it were the personal estate of an intestate.

The provisions of the statute in this case, as to collateral heirs, follow the statutory provisions providing for lineal descendants. Gen. Code 8582 provides:

"If some of the children of such intestate are living and others are dead, the estate shall descend to the children who are living, and to the legal representatives of such as are dead, so that each child of the intestate who is living will inherit the share to which he or she would have been entitled, if all the children of the intestate were living, and the legal representatives of the deceased child or children of the intestate inherit equal parts of that portion of the estate to which such deceased child or children would be entitled, if such deceased child or children were living."

Gen. Code 8583 then provides for the contingency presented in this case. It reads as follows:

"The provisions of the next preceding section shall apply in all cases in which the descendants of the intestate, entitled to share in the estate, are of an equal degree of consanguinity to the intestate, so that those who are of the nearest degree of consanguinity will take the share to which he or she would have been entitled, had all the descendants in the same degree of consanguinity with him or her, who died leaving issue, been living."

Here we have persons entitled, under the inheritance laws of Ohio, to property, who are of unequal relation by consanguinity to the ancestor.

Gen. Code 8581 provides:

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"When all the descendants of an intestate, in a direct line of descent, are of an equal degree of consanguinity to the intestate, whether children, grandchildren or great grandchildren, or of a more remote degree of consanguinity to such intestate, the estates shall pass to such persons of equal degree of consanguinity to such intestate in equal parts, however remote from the intestate such equal and common degree of consanguinity may be."

The persons in this case who are of equal degree of consanguinity to the testator are the nephews and niece and they will, under the laws of inheritance, take the share to which each would have been entitled if all the nephews and nieces had been living.

There were five nephews and nieces, hence each nephew and niece would take one-fifth of the residue.

The children of the deceased nieces will take by representation, that is, each set will take what would have come to their parent had she been living, which share they shall enjoy equally, following the provisions of Gen. Code 8582 as provided for in section 8583.

In *Parsons v. Parsons*, 52 Ohio St. 470 [40 N. E. Rep. 165], the Supreme Court interpreted R. S. 4166, which is now Gen. Code 8582, as providing for grandchildren taking by representation where there were children living.

This case approves *Dutoit v. Doyle*, 16 Ohio St. 400, the syllabus of which is as follows:

"The seventh section of the act regulating descents, passed March 14, 1853, did not change the rule (which has always prevailed in Ohio) that in case of a descent cast upon children, where some of the children were living and others dead, leaving issue, the share to which each of the deceased children would, if living, have been entitled, should descend to the issue or legal representatives of each respectively."

Section 7 of act 51 O. L. 499 was reenacted into R. S. 4166 (Gen. Code 8582) without substantial change and introduces the principle of representation.

This Sec. 7 was part of Sec. 10 of the act of February 24, 1831 (29 O. L. 252), and follows the rule of descent provided

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successively by acts of February 22, 1805 (3 O. L. 279), December 30, 1815 (14 O. L. 36), and February 11, 1824 (22 O. L. 132).

The act of 1853 did not change the rule of descent. Hence, following Gen. Code 8583 which provides that: "In all cases in which the descendants of the intestate, entitled to share in the estate, are of unequal degree of consanguinity to the intestate, * * * those who are of the nearest degree of consanguinity, will take the share to which he or she would have been entitled, had all the descendants in the same degree of consanguinity with him or her, who died leaving issue, been living," the plaintiff together with the niece and the other nephew would each be entitled to one-fifth.

Then pursuant to Gen. Code 8583 we must look to Gen. Code 8582 to find the portion to which each of the grandnephews and nieces are entitled which, as shown above, apportions to each set the portion their parents would have been entitled to if living. Each of the grandnephews and nieces in this case get one-tenth.

In the case of *Ewers v. Follin*, 9 Ohio St. 326, the Supreme Court construed Sec. 10 of the act of February 1831 which provides for a distribution *similar* to that provided in Gen. Code 8582. It was there held that "when an estate descended to nephews and nieces, legal representatives of brothers and sisters, no brother nor sister of the intestate surviving, the nephews and nieces took *per capita*; and if a nephew or niece had died before the intestate, leaving children, such children took *per stirpes* the share of the deceased parent."

In a recent case in *Goff v. Disbennet*, 33 O. C. C. 234 (14 N. S. 557), it was held that: "Title to property acquired by purchase, upon death of the owner intestate, with no heirs except nephews and nieces, is cast by Gen. Code 8574 upon such nephews and nieces as a class, and they take under Gen. Code 8581 *per capita* and not *per stirpes*."

A decree for distribution in the manner indicated herein may be entered.

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COURTS—MILITIA.

[Cuyahoga Common Pleas, June 7, 1913.]

IN RE EDWARD S. SMITH.

1. Power of Military Commander in Case of Overwhelming Disaster to Make Reasonable Regulations for Protection of Life and Property.

The commanding officer of troops of the Ohio National Guard, when such troops are ordered into active service by the governor in cases of riot, disorder, invasion, or overwhelming disaster, may make reasonable regulations for the protection of life and property, whether martial law has been proclaimed or not.

2. Excluding Persons from Flooded District without Pass.

Where a portion of a city has been visited by a disastrous flood, and much property has been temporarily abandoned by reason thereof, an order by the commander of troops excluding all persons from such flooded district without a pass was a reasonable and proper regulation.

3. Troops may Arrest or Eject Person Forcing across Guarded Line.

Troops so on duty under such circumstances might properly arrest a person who sought to force his way across their line, whether martial law had been declared or whether the troops were called in aid of the civil authorities only; or they might forcibly eject him, using no greater force than necessary.

4. Trial of Person by Military Commission or by Civil Authorities.

After such arrest, the offender might be brought to trial before a military commission if martial law were declared, but if not, he should be turned over to the civil authorities.

5. Military Prisoner Turned over to Civil Courts Stops Military Jurisdiction.

Upon such a prisoner being turned over to the civil authorities, the jurisdiction of the military commander ceases; and the validity of an ordinance under which he is subsequently arraigned and tried by the civil authorities may be tested by habeas corpus.

6. Resisting Person Called to Assist an Officer not Offense.

An ordinance of the city of Warren making it an offense "to resist a person called to assist an officer" is void, first, for the omission of the words "in making an arrest," and second, by reason of the fact that the legislature has made the same act an offense under the state law, and the city council was without authority to enact the ordinance.

7. Soldiers not called by Civil Officers to Assist in Making Arrest.

Even under laws making it an offense to resist a person called to assist an officer in making an arrest, citizen assistants are contemplated; and troops acting under the authority of the governor would not be properly so designated. They are more in the class of officers themselves, as they act under the direction of their military superiors, and not by direction of the arresting officer.

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8. Person Passing Fire Lines or Guards Guilty of Resisting Officer.

Where an officer has lawfully assumed control over or protection of property, and in an emergency justifying it has segregated it for its more complete protection, as by fire lines or guards, a person knowingly forcing his way through such lines or guards might properly be charged, under Gen. Code 12858, with resisting an officer, even though no force be directed against his person.

[Syllabus approved by the court.]

HABEAS CORPUS.

F. F. Truhlar, for relator:

Cited and commented upon by the following authorities: Dillon, Mun. Corp. (5 ed.) Secs. 237, 238; *Ravenna v. Railway*, 45 Ohio St. 121 [12 N. E. Rep. 445]; *Canton v. Nist*, 9 Ohio St. 439; *Wellsville v. O'Conner*, 24 O. C. C. 689 (1 N. S. 253); *Akerman v. Lima*, 8 Dec. 430 (7 N. P. 92); *Clamp, Ex parte*, 9 Dec. Re. 672 (16 Bull. 229); *Falk, Ex parte*, 42 Ohio St. 638; *Ames v. State*, 22 Dec. 92 (11 N. S. 385); *Keller, Ex parte*, Dayt. 207; *Thomas v. Ashland*, 12 Ohio St. 124.

Wing, Myler & Turney, E. K. Wilcox and J. P. Mooney, for respondent.

FORAN, J.

In the case of the application of Edward S. Smith for a writ of habeas corpus, if counsel for the relator desires to amend his petition by stating that the ordinance under which this man was arrested, convicted and imprisoned is invalid and its enactment beyond the powers of the city council of Warren, he may do so.

In this case the relator says that he is unlawfully imprisoned by W. H. Cowley, superintendent of the Cleveland Correction Farm, Cuyahoga county, Ohio; that he was imprisoned on a charge contained in an affidavit of one F. H. Flowers, for unlawfully and wilfully resisting an officer, or a person called to assist a police officer of the city of Warren, Ohio. He says that he was brought before Z. F. Craver, mayor of the city of Warren, for trial; that the affidavit was read to him; that he pleaded not guilty and demanded a jury trial, and that the mayor refused to impanel a jury to try him; that said mayor thereupon, without impaneling a jury, proceeded with the trial, and, upon the testi-

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mony of two members of the Ohio National Guard, found him guilty and sentenced him to pay a fine of \$25 and costs, and stand committed until the fine and costs were paid.

The record does not disclose the proceedings had upon this charge before the mayor. It was admitted by counsel for complainant, however, that he was arrested under an ordinance which only imposed a fine as a penalty; that imprisonment is no part of the penalty, except as a means of collecting the fine, therefore he was not entitled to a trial by jury; and if he did demand a jury trial, it was properly refused.

From further admissions by Colonel Turney, of counsel for respondent, it seems that about March 28 of this year unprecedented storms and floods prevailed throughout Ohio, and that the city of Warren, Trumbull county, was so visited. In the city of Dayton, and perhaps other cities, martial law was declared. In the city of Warren martial law was not declared. Conditions were so serious, however, that the militia were called out by the governor, and one company of the Ohio National Guard under orders to proceed to Dayton, Ohio, was held at Warren, for the purpose of aiding the civil authorities of that city in protecting property and preserving order; and it is said that this company of the Ohio National Guard, acting in concert with the civil authorities, established a picket line or a line of pickets surrounding a portion of the flooded district, which had been abandoned by many citizens seeking safety on the higher ground, and leaving much unprotected property, for the purpose of protecting such property and preventing people, citizens or other persons, from going into that district. That the relator in this case, notwithstanding the civil authorities had requested the militia to establish this picket line around this district, or perhaps, rather, to protect persons and property in this district, passed through the picket line or the guard, against their protest. That he did this upon the pretense that he desired to take some pictures of the flooded district, but it is claimed by the respondent, and perhaps with some considerable truth, that his real purpose was to show his defiance and contempt of authority, and especially the authority of the citizen soldiery thus on duty. Be that as it may, it is quite clear that the conduct of the relator

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was extremely reprehensible. When these guards were placed around that district, all citizens and all persons were under moral, if not legal, obligation to obey the order; and when this man undertook to dispute the order, he placed himself upon a level with common violators of law. He did an act that reflects discredit upon himself, and placed himself in the position of a common disturber of the peace. Any man who had any conception of the duties he owed to the community and the duties he owed to himself would have obeyed the order and kept away from that district; but for some reason or another this man saw fit to disregard the order, and, in open defiance thereof, he passed through the line of the National Guard. For this act he was arrested by the guard, turned over to the civil authorities, taken before the mayor, tried, convicted and sentenced, as above set forth. If these members of the National Guard had forcibly ejected him from the line they were guarding, even at the point of the bayonet, but using no more force than necessary to accomplish such ejection, they would have been within the law, and he could not complain, even though martial law had not been declared in that portion of the state.

General Code 5275 provides that, when a portion of the National Guard is ordered into active service, the rules and articles of war and general regulations for the government of the army of the United States shall be in force, and regarded as part of the title of the statutes of this state relating to the militia.

It is claimed by the respondent, and properly so claimed, that under this section of the General Code the militia, while in active service, may forcibly eject a person who is disobeying any lawful order made by the militia, or its commander, from their camp or lines; second, they may arrest and try such person by a military commission; third, they may arrest and turn such person over to the civil authorities. In the present instance the commander in chief of the National Guard, by order, reversed this order of procedure, that is to say, directed the troops to adopt the third course if practicable, the second if the civil courts were not able to take the case, and the first in cases of necessity only; and therefore the relator was arrested and turned

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over to the civil authorities. These regulations, and other reasonable regulations, necessary under the circumstances for the protection of life and property, the commanding officer of the Ohio National Guard had a right, under this section of the statutes, to make and enforce. The order of the commander of the troops establishing this line and forbidding persons to pass through it, had the same force and effect as if made by the mayor or chief of police, and was being enforced by patrolmen under him, even though the means and methods of enforcing the order were different.

I cannot find language strong enough to characterize the conduct of the relator under all the circumstances. The members of the National Guard who were on duty at the time left comfortable homes and were doing duty at Warren to aid in protecting life and property and to preserve order during the emergency then existing. Weather conditions were extremely severe, and these men subjected themselves to all the extreme hardships of military life. They were doing this for the preservation of order and the protection of life and property; and any man that interfered with them cannot be regarded as a good citizen, and must be characterized as an unspeakable ass. The National Guard of Ohio, so far as I am aware, is composed of some of the best men in our state. They are deserving of credit for belonging to the guard, and must be regarded as citizen soldiery of the first class; and when they are called out to preserve life and property, any man that interferes with them in the discharge of their duties in this respect shows he has no proper conception of the duties of citizenship, and is in fact unfit to be a citizen. But this is beside the question.

The relator was arrested by two members of the National Guard, and the question arises, did they have authority to make this arrest? And more particularly the question arises, was the trial and conviction of the relator by the mayor of the city of Warren, under the section of the ordinances of that city under which he was tried, valid?

In answer to the first query: To say that they were not authorized in law to make the arrest would lead to the absurd conclusion that, although the legislature had enacted definite

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provisions for the calling out of the troops in like emergencies, yet when so called they might do nothing toward accomplishing the purposes for which they were so called, or discharging one of the highly important duties for which they were organized. We therefore hold that authority for making the arrest was clear. A consideration of the second proposition, however, presents another important consideration. It will be conceded that when the relator was turned over to civil authorities, the militia had no further power or authority over him. The commitment is as follows:

"Whereas Edward S. Smith, late of said county, City of Warren, has been arrested upon the oath of F. H. Flower, in that on the 29th day of March, A. D. 1913, in the City of Warren, County of Trumbull, the said Edward S. Smith unlawfully and wilfully did oppose and resist an officer or a person called to assist a police officer in the City of Warren."

The resisting of an officer in this instance seemingly consisted in violating the order of the National Guard, an order that the commander of the guard had a right, under the circumstances, to make and enforce. This is very evident from the reading of the context of this affidavit, and from the facts and admissions before the court. It is not claimed that there was any physical resistance, nor was that necessary, for, to constitute the offense of resisting an officer, it is not necessary that the officer should be assaulted, beaten or bruised. *Woodworth v. State*, 26 Ohio St. 196. It would be sufficient to constitute the offense of resisting an officer if the relator knowingly and wilfully, in the presence of the officer, obstructed or interfered with the officer in the discharge of his duty; that is, if a member of the National Guard can be said to be an officer or a person called to assist an officer within the meaning of the law.

Under Gen. Code 5275, above cited, it may be claimed that when members of the National Guard are on active duty in aiding and assisting the civil authorities to preserve life and property, they are officers within the meaning of the law; but, without passing upon that very doubtful question, it may be sufficient to say that if the civil authorities ordered this line of pickets around this flooded district, the civil authorities and its officers

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were at least constructively present, and the relator might have been arrested, tried and convicted under the state law for resisting an officer if he knew the civil authorities had established this line or had ordered it to be established. It is not essential to the conviction of the relator for the offense committed by him, if any, to hold that members of the National Guard are civil officers. He certainly could have been arrested and tried, under the ordinance of the city of Warren, for disorderly conduct, and punished as this ordinance prescribes, for no one will deny that his conduct was contumaciously disorderly. It is contended, however, by the respondent, that this is an application to review a proceeding, and therefore should be denied; that is, to review a criminal proceeding.

Now, while it is undoubtedly true, as a fundamental, elementary proposition, that a writ of habeas corpus can not be used to perform the functions of a writ of error, it is equally true that a person can not be lawfully arrested and imprisoned for violation of an ordinance the enactment of which is beyond the power of the council passing the same, or otherwise invalid, or a statute or a law that is unconstitutional or invalid; and when so arrested and imprisoned, and he seeks relief on habeas corpus, the question as to constitutionality or invalidity is a jurisdictional one. If the party is tried and convicted by a court of limited jurisdiction, such as a mayor's court (and that is the case here) a court authorized to issue the writ (and this court is authorized to issue the writ) will examine into the constitutionality or validity of the statute or ordinance, and remand the prisoner if the statute is found unconstitutional and invalid, or discharge him if the ordinance is found invalid for any reason.

To obtain relief on habeas corpus from a judgment void because the ordinance under which the prisoner was convicted and imprisoned is invalid or unconstitutional, that fact must be asserted, as it is a jurisdictional fact and is the only question involved. That is the reason I have permitted an amendment to the petition. I want to give the defendant, notwithstanding I believe his conduct is reprehensible in the extreme, the benefit of every legal safeguard the law provides. If the judgment is good

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in part and bad as to the remainder, and the good is complete in itself and can be separated from the invalid part or the unconstitutional part, the unauthorized part may be disregarded. We do not think this can be done in this instance. How can the valid part of this ordinance, if it be valid, be separated from the invalid part thereof? The ordinance presented to the court is as follows:

"Sec. 133. Abusing an officer. It shall be unlawful for any person to abuse any officer of the city of Warren, Ohio, or wilfully oppose, resist, obstruct or interfere with any police officer of the city, or person called to assist either of said officers in the discharge of his official duty."

Reference is here made, of course, to civil officers.

If it be conceded that the city of Warren had authority, under and by virtue of the statutes of the state, to pass the first portion of this ordinance, it certainly had no authority to pass the latter paragraph of the ordinance, that is, to arrest, convict and imprison a man for interfering with a person called to assist an officer in the discharge of his official duty. Surely, if an officer should call upon a citizen to help him serve writs of subpoena, or to assist him in patrolling his beat, it would not be a misdemeanor to resist the person so called upon while he was aiding the officer in this respect. A citizen would have no means of knowing whether such a person was an officer, and, as a matter of fact, he would not be an officer; and if such a man undertook to arrest a citizen, it would not be an offense to resist such arrest. This could not be done even under the state law. Gen. Code 12857 provides, that if a person called upon by an officer to assist the officer in apprehending a person charged with or convicted of a criminal offense, or in securing such a person when so apprehended, or in conveying him to prison, and the person so called upon to assist the officer neglects or refuses to do so, he shall be fined not more than \$50. Here we find that it is not an offense against the laws of this state to refuse or neglect to assist an officer in apprehending a person, or in securing such person when apprehended, unless the person has been charged with or is convicted of a criminal offense. So that, even under the state law, an information or indictment simply

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charging a person with refusing to assist an officer in the discharge of his duty, without the further statement that he was called upon to assist the officer in apprehending a person charged with a crime or convicted of a crime, would not be sufficient; and no conviction could be based upon such information or indictment.

By virtue of Gen. Code 13492, under the facts in this case, the relator might have been held for a violation of an ordinance preventing disorderly conduct and providing for its punishment, until a warrant could be obtained; but, as has been said, the difficulty in the case before the court, even if it be admitted that the ordinance is valid in part and invalid in part, is to determine under which portion of the ordinance the relator was convicted.

A city or municipality has no inherent power to pass ordinances or enact laws. It has no powers in this respect except such as are expressly and clearly conferred upon it, or granted to it by the legislature, or which must necessarily be implied by clear intendment in order to carry into effect the powers expressly granted. In this respect, the distinction between the constitutional and statutory provisions obtains. The constitution is the basic, fundamental or organic law of the state, in which rests the supreme power so far as delegated by the people in their sovereign capacity. A statute is the written will of the governing body, or the legislature, created by the constitution. This governing body can not exceed the powers granted to it by the constitution. Any power not expressly granted or fairly and necessarily implied to carry into effect the powers expressly granted, is retained. Municipal corporations are agencies or instrumentalities to which the legislature delegates a portion of the governmental power vested in it, in order to meet local conditions and wants pertaining to populous communities, for which the legislature makes only general provisions; and any power not so expressly delegated, or which may be necessarily implied, to carry into effect the power so expressly granted, is retained by the state. Where the legislature has enacted laws for the punishment of offenses, and thus exercised its jurisdiction in that regard, a presumption arises that the legislature intended to make its jurisdiction over such matters exclusive; and if a

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municipality undertakes to exercise jurisdiction over offenses of which the legislature has taken exclusive jurisdiction, and a grant of legislative power is uncertain or doubtful, the power of the municipality in that regard must be denied.

By Gen. Code 12858, the legislature provides that it shall be a misdemeanor to resist, abuse or obstruct an officer, and provides severe punishment or penalties for such offenses. The claim by the city of Warren of the power also to provide by ordinance for the punishment of the same offense is surely wholly unnecessary and superfluous, and its power to do so should be supported by legislative grant so clear and explicit as to leave no room for doubt.

It is claimed that the contention, if given full scope and carried to its legitimate conclusion, would enable municipal corporations to pass and embody into ordinances the whole body of state laws providing for the punishment of misdemeanors of every nature and description. Such a contention cannot for a moment be entertained. The fact that the state has provided for a punishment for resisting an officer precludes the city of Warren from exercising the power to pass the ordinance in question. The only legislative grant of power to municipalities with respect to the enactment of ordinances for the punishment of offenses is R. S. 1692, which was in force at the time the ordinance in question was passed or enacted. This section, however, is limited in its scope by R. S. 2108, which was also in force at the time this ordinance was passed.

By R. S. 1692, it is provided that municipalities, in addition to the power specifically granted in the title of which that section is a part, and subject to exceptions and limitations in other parts of it, shall have general powers to provide by ordinance for the prevention of riots, gambling, noise and disturbance, indecent and disorderly conduct, and to preserve the peace and good order and protect the property of the respective municipalities and its inhabitants.

This power, as has been said, is limited by R. S. 2108, which gives the council of a municipality the power to provide for the punishment of persons disturbing the good order and quiet of the corporation by clamor and noise in the night season, by in-

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toxication, drunkenness, fighting, using obscene or profane language in the streets or other public places, to the annoyance of the citizens, or otherwise violating the public peace by indecent and disorderly conduct, or by lewd and lascivious behavior.

It is true that the power granted by the legislature, and intended by it, under R. S. 1692, is the power to suppress and punish minor acts of misconduct that are generally known as public disorders and annoyances; and in so doing it is undoubtedly true that a municipality may duplicate, in these minor acts of misconduct, offenses punished by the state.

As was said in *Wellsville v. O'Connor*, 24 O. C. C. 689, 694 (1 N. S. 253), by Burrows, J.:

"It is evident that the legislature intended to cover the whole field of public peace regulation in the latter section (Rev. Stat. 2108), not some small portions of it; and if that has been done the attempt to extract from Rev. Stat. 1692 the authority contended for must fail technically as well as actually. If we are right in our position that the claimed authority must be found if at all in Rev. Stat. 2108, the controversy comes to an end; for this section cannot, by any sort of microscopic analysis, be made to furnish authority to the council to make the crime of assault and battery a municipal offense.

"It is a piece of legislation that carries the ear-marks of careful consideration. Its domain is outside of the criminal laws of the state, and is a complete supplement of them. * * * It embraces only such local and comparatively trifling misconduct as may cause disturbance and annoyance to citizens upon the streets or other public places; and allows the corporation to punish such misconduct, although it may be incidental to the commission of a greater offense made punishable by the statute."

And indeed it may be said that the prosecution under an ordinance for the punishment of these local offenses will not be a bar to a prosecution by the state for the same offense where the state provides a penalty therefor. Indeed we may go farther, and say that the relator in this case may still be prosecuted for any offense that he really committed, either by

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drunkenness disturbs the good order and quiet of the corporation or city.

The same question was passed upon the same way in *Jefferies v. Defiance*, 11 Dec. Re. 144 (25 Bull. 68), and in *Fitzsimmons, In re*, 57 Bull. 285 (13 N. S. 104).

In the case of *Zacharow, In re*, 57 Bull. 285 (13 N. S. 119), the same being a case in habeas corpus, it appears that the relator was charged with a misdemeanor under Gen. Code 13511, in the police court of Cincinnati, and sentenced to the workhouse. There was no waiver of a jury in writing, and no jury was had. The relator was discharged, for the reason that Gen. Code 13511 provides that "If the accused, in a writing subscribed by him and filed before or during the examination, waive a jury and submit to be tried by the magistrate, he may render final judgment."

It was held in this case that the magistrate had no jurisdiction unless a jury trial was waived according to law. The relator, after the writ had been allowed to issue, prosecuted proceedings in error to the police court in the common pleas court of Hamilton county; and it was held that this action did not affect the status of the case before the court, nor deprive the relator of a hearing upon the merits of the writ as the facts existed when the writ was sued out. In other words, the court held that the magistrate, because defendant had not waived a jury in writing, had no jurisdiction to try the case; and for that reason the defendant should be released and discharged on habeas corpus.

For the reasons indicated, the writ will be allowed and relator discharged.

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PARTITION.

[Hamilton Common Pleas, 1913.]

KNECHT V. KNECHT.

Lien of Mortgage Executed by Cotenant Before Partition Suit Begun Superior to Claim of Other Cotenant for Rents and Profits.

The lien of a mortgage executed by one cotenant prior to the institution of a suit for partition and for the recovery of rents and profits under Gen. Code 12046 is superior to the claim of the other cotenant for rents and profits decreed in such suit.

[Syllabus by the court.]

Powell & Smiley, for motion.

Peck, Schaffer & Peck, contra.

MAY, J.

This matter is submitted to the court on the motion of one of the cotenants for an order directing the sheriff to pay to said cotenant a sum of money found by previous order of the court to be due such cotenant from the other cotenant for rents and profits collected before the partition suit, for distribution to the mortgagee, the Western German Bank, of the amount found due it on its mortgage executed before the bringing of the partition suit.

It is contended by the claimant under Gen. Code 12046, that this order should be granted for the reason that such cotenant has a lien on the whole property and especially on the interest of his cotenant for rents and profits so collected. The matter has never been determined as far as I have been able to find, by any Ohio court.

Counsel for claimant cited in support of the motion *Beck v. Kallmeyer*, 42 Mo. App. 563. This case is squarely in point and is the only case that directly decides the question.

In the case of *Peck v. Williams*, 113 Ind. 256 [15 N. E. Rep. 270], it was not necessary to decide this point, and while the language of the court is broad enough to sustain the contention, nevertheless it is a mere dictum.

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The case of *Arnett v. Munnerlyn*, 71 Ga. 14, follows the same case as reported in *Hill v. Reeves*, 57 Ga. 32, which also sustains the contention of counsel.

It will be noticed in the syllabus in *Arnett v. Munnerlyn*, *supra*, that it is held that the matter is *res judicata* as far as the case before it was concerned. Whether the Georgia court would follow this is doubtful. (See the case of *Pope v. Tift*, 69 Ga. 741, third syllabus.)

Some of the nisi prius cases in New York seem to hold in favor of the motion, but no case in either the appellate division or court of appeals of New York sustains this view. The weight of authority is against the motion.

While it is true that there is no Ohio case directly in point, there is, however, a decision of the federal court of the southern district of Ohio, deciding the exact question involved.

In *McArthur v. Scott*, 5 O. F. D. 682 (31 Fed. Rep. 521), Mr. Justice Jackson, then sitting as circuit judge in this district, held that the lien of a mortgagee executed by one cotenant prior to the institution of a suit for partition and for the recovery of rents and profits collected by the other cotenant, is superior to the claim for rents and profits decreed in such suit. In the course of his opinion the learned judge says:

"The general rule, which is sanctioned by the great weight of authority, is that the equitable claim of one tenant in common against his cotenant, for rents and profits received in excess of his share, is superior only to subsequent mortgages or liens; that prior mortgagees or incumbrances are not necessary or proper parties to the partition proceedings between cotenants; and that the rights of such prior mortgagees are not to be affected by such partition proceedings."

One of the best considered cases on the subject is *Vaughan v. Langford*, 81 S. C. 282 [62 S. E. Rep. 316; 128 Am. St. Rep. 912; 16 Ann. Cas. 91]. At page 287 the court says:

"Such liens (for rents and profits collected) would be indefinite in amount, and not disclosed by public records, upon which third parties in dealing with the owners of property

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ordinarily have a right to rely. They would greatly injure tenants in common by impairing the market value of their shares and interests, because of the apprehension on the part of those contemplating purchasing such interests or otherwise dealing with them, that the claims for rents might be established as superior liens."

Some of the other authorities sustaining the view that the lien of a cotenant for rents and profits is not superior to a mortgage executed prior to the bringing of the partition suit are *Burch v. Burch*, 82 Ky. 622; *Burns v. Dreyfus*, 69 Miss. 211[11 So. Rep. 107; 30 Am. St. Rep. 539], a very well considered case; *Flack v. Gosnell*, 76 Md. 88 [24 Atl. Rep. 414; 16 L. R. A. 547; 35 Am. St. Rep. 413]; *Flach v. Zanderson*, 91 S. W. Rep. (Tex.) 348. See also 38 Cyc. 72; 2 Jones, Liens 1155, 1156.

The motion will be overruled.

TELEGRAPHS AND TELEPHONES.

[Licking Common Pleas, September Term, 1911.]

GRATIOT & BROWNSVILLE TEL. CO. v. BROWNSVILLE FARMERS' TEL. Co.

1. Certificate from public Utilities Commission not necessary for Telephone Company Purposing to do a Private Business Only.

A certificate from the public utilities commission is not necessary to authorize a telephone company to carry on a telephone business, unless the company is seeking to exercise some license or franchise, and proof of the incorporation of a telephone company and the purchase of fifty telephone instruments and some poles, cross-arms, wire, etc., is not sufficient to sustain an allegation that the company is about to exercise a franchise and engage in the public service, as distinguished from providing private lines for the use of stockholders and others residing within a short distance.

2 Allegation of Adequacy of Service of Existing Company, Traversed in Answer and not Supported by Proof Fails.

An allegation by an existing telephone company that it is rendering adequate service in the field of its operation, where not supported by any evidence and traversed by the answer of the defendant, requires a judgment in favor of the defendant as to that issue.

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3. Communication over Lines not Connected with Switch Board not Contempt for Violation of Injunction against Conducting Telephone Business.

Persons enjoined from entering into the telephone business are not in contempt of court who communicate with each other over private lines, which are not connected with any switch-board and are not capable of serving anyone except those on each particular wire.

Winn & Bassett, for plaintiff.

Fitzgibbon & Montgomery, for defendant.

WICKHAM, J.

The plaintiff filed its petition in this case on August 22, 1911. It alleges that it is an Ohio corporation, and since September 1, 1904, it has been, and still is, the owner of a telephone line and plant for the furnishing of telephone service to the public; that the defendant is also an Ohio corporation incorporated about March 10, 1911, and that it is now engaged in the construction of a telephone plant and line in Licking and adjoining counties in the same territory and locality in which the line and plant of plaintiff is located, and that for the purpose of so constructing said plant and line it has purchased supplies, material and equipment; that it has erected about 150 poles and that it has purchased about 340 telephone poles, about 200 cross-arms and 50 telephone instruments, a switch-board and a large quantity of wire; that no wire has been strung upon the poles erected by the defendant, but that the defendant will string wires unless restrained by an order of this court; that the said proposed line of the defendant is not and never has been opened for public service and that no messages have been either sent or transmitted thereon: that the defendant has so begun the construction of its proposed telephone line without a certificate as required by Sec. 54 of the public utilities law, passed by the general assembly of Ohio on May 31, 1911, and published in 102 O. L. 549, *et seq.*: that the public service commission of the state has at no time made any finding or determination that the construction and operation of said proposed line by defendant was proper and necessary for the public convenience; and no such certificate of public necessity has been issued to defendant by

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said public service commission of Ohio. It further alleges that the defendant proposes to open its said telephone plant and line for public service and will operate the same for the public use without having obtained a certificate as required by Sec. 54 of the public utilities act.

It further alleges that it, the plaintiff, is operating a telephone line and plant in the same locality and that it is rendering adequate service to its patrons and that the plaintiff will suffer great and irreparable injury by reason of the loss of patronage if the defendant company is permitted to proceed; and it prays for an injunction restraining the defendants and its officers, agents, etc., from constructing and operating the said telephone line, or in any manner attempting to operate said proposed telephone line and from soliciting plaintiff's subscribers to discontinue the service of plaintiff until it shall have secured from the public service commission of Ohio a certificate of public necessity as aforesaid and as required by Sec. 54 of the public utilities act.

Upon the filing of this petition, this court granted a temporary injunction, as prayed for in the petition. Afterward, on September 11, 1911, the defendant company filed a motion to dissolve the temporary injunction upon the grounds: first, that the facts set forth in the petition of the plaintiff were untrue; and, second, that the court had no authority in law to grant the temporary injunction. The case was set for hearing upon a motion to dissolve the temporary injunction and by agreement of counsel representing both parties in the suit the case was submitted upon its merits.

The ground upon which the plaintiff relies for a decree of this court restraining the defendant company from constructing and operating its telephone plant is that the defendant has not secured from the public service commission of the state a certificate that the exercising of the franchise of the company is necessary to the public convenience, assuming that when the defendant's plant is constructed if it ever be completed, it will become a public service telephone company.

A determination of the merits of this case requires a con-

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struction of Sec. 54 of the public utilities act, which reads as follows:

"No telephone company shall exercise any permit, right, license or franchise that may have been heretofore granted but not actually exercised or that may hereafter be granted to own or operate a plant for the furnishing of any telephone service, thereunder in any municipality or locality, where there is in operation a telephone company furnishing adequate service, unless such telephone company first secures from the commission a certificate after public hearing of all parties interested that the exercising of such license, permit, right or franchise is proper and necessary for the public convenience."

It is admitted by the defendant that it has not secured such a certificate from the public service commission. It maintains, however, that it is not required to secure such a certificate, because it is not seeking to exercise any right, license, permit or franchise; and that it is only where a company or person has a franchise for a certain purpose or purposes that it is necessary for it to secure a certificate from the public service commission.

It admits that its purpose is to serve the public, but in its answer filed in the case it denies that plaintiff company has been or is now furnishing adequate telephone service to its patrons.

It may be stated, for the purpose of clearing the view of this case, that there is no provision of law by which the public service commission may limit or restrict the right of a company as to building or constructing a telephone line or plant.

The petition in this case prays for an injunction to enjoin the defendant from constructing its plant, and the court, upon application, probably without careful consideration, granted a temporary injunction as prayed for in the petition. But the only authority which the state has seen fit to exercise over a public telephone company is to limit its right to use or exercise its franchise and to operate a plant for the furnishing of any telephone service thereunder. It does not pretend to interfere, and I think we are not going too far when we say that it could not interfere, with the construction of a telephone plant. So that the question is, in this case, whether it is necessary for the

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defendant to secure from the public service commission a certificate authorizing it to exercise its franchise to operate its plant.

It is claimed by counsel for the defendant that it has no right, license, permit or franchise, and therefore it does not come within the provisions of Sec. 54 of the act under consideration. It is argued by counsel for the plaintiff in their brief that the defendant company has no right, license, permit or franchise to operate a public telephone plant, and it seems to me that by such argument the plaintiff's counsel argue their case out of court, if their view is adopted by the court. Contrary to the argument of counsel for both parties the court's view is that the defendant has a franchise, or may secure a franchise for the use of the public highways, if it is, in fact, a public telephone company.

Gen. Code 9170 provides:

"A magnetic telegraph company may construct telegraph lines, from point to point along and upon any public road by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires; but shall not incommode the public in the use thereof."

This section of the statutes grants to a public telegraph or telephone company a franchise to use the public highways of the state so long as they comply with its terms.

Gen. Code 9180 provides:

"Any person or persons may construct lines of electric telegraphs, from point to point, upon and along any of the public roads and highways, and across any waters within the limits of this state, by the erection of the necessary fixtures, including posts, piers, or abutments for sustaining the cords or wires of such lines. But they shall not be so constructed as to incommode the public in the use of the roads or highways, or endanger or injuriously interrupt the navigation of such waters. This provision shall not authorize the erection of a bridge across any waters of this state."

This section of the statutes is broader than Gen. Code 9170, in that it includes "any person or persons" either individuals or corporations, whereas, Gen. Code 9170 is confined to corpora-

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tions, while telegraph companies only are mentioned in this section of the statutes.

Gen. Code 9191 provides as follows:

"The provisions of this chapter apply also to a company organized to construct a line or lines of telephone; and every such company shall have the powers and be subject to the restrictions herein prescribed for magnetic telegraph companies."

The rights granted by these sections of the statutes constitute a franchise, and it is what is designated by writers on the subject as a secondary or special franchise and it is entirely distinguished from the franchise of a company to exist as a corporation.

The right to be a corporation, derived from its charter, is commonly called the primary franchise and is to be clearly distinguished from any other rights granted by the statutes.

In Joyce, Franchises Sec. 3, we read:

"Whenever a corporation is legally formed, the right to be and exist as such and as a corporation to do the business specified and authorized in the articles, constitutes a valuable right which has been called the 'corporate franchise,' as it is a grant from the sovereign power."

Also, Sec. 7:

"A right granted to a corporation to construct, maintain or operate in a public highway some structure intended for public use, which except for the grant would be a trespass, is a special franchise, and when a right of way over a public street is granted to a corporation with leave to construct and operate a street railway thereon, the privilege is known as a special franchise."

The author of this work in subsequent sections discusses and defines the distinction between the primary franchise, or right to be a corporation, and the secondary or special franchise of the corporation.

This distinction is also clearly expressed by our own Supreme Court in the case of *Coe v. Railway*, 10 Ohio St. 372 [75 Am. Dec. 518]. I read a paragraph found on page 385:

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“The order of our inquiry next calls for an examination into the nature and character of the franchises of the corporation. It has been said, ‘the essence of a corporation consists in a capacity: 1, to have perpetual succession under a special name, and in an artificial form; 2, to take and grant property, contract obligations, sue and be sued by its corporate name, as an individual; and 3, to receive and enjoy, in common, grants of privileges and immunities.’

“Each of these applies to the corporation under consideration. Under the two first is described what may be termed the franchise of the corporators, or individual members of the corporation, and under the last what may be termed the franchises of the corporation. As said in a recent case: ‘A corporation is itself a franchise belonging to the members of the corporation; and a corporation, being itself a franchise, may hold other franchises, as rights and franchises of the corporation.’”

Thus we see that the right to be and exist as a corporation is a franchise belonging to the incorporators, and the rights and privileges of the company itself are the franchises of the corporation.

The next inquiry we will consider is this: Is the defendant in this case a public service corporation and does the proof show that fact? The evidence is that the company had purchased some poles, wire and switch-board; some cross-arms and fifty telephones. They had put the switch-board in place in the village of Brownville, which should be stated is an unincorporated village, and had erected some poles, but it had installed no telephones and strung no wires. The employes of the company were engaged in erecting poles and attaching cross-arms thereto when estopped by the temporary injunction. By what right the company had erected their poles along the line of the public highway does not appear from the evidence in this case.

The defendant company, as has been stated, had purchased fifty telephones. There was no evidence tending to show that they contemplated any greater number. No part of their proposed line was within any municipal corporation. They proposed to build it in the unincorporated village of Brownville

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and its vicinity, and their purpose was to secure means of communication among about fifty residents of Brownsville and vicinity. There is no proof that they contemplated any long distance connection or service. It also appeared that the stockholders in the defendant company, with disaffected patrons of the plaintiff, had discontinued the use of plaintiff's telephone and had organized a company to construct a telephone plant for their own use and convenience and for the purpose of affording them means of communicating with each other. Beyond showing those facts, the record in this case is entirely silent.

The petition of plaintiff alleges that the defendant company was about to engage in the service of the public, but the evidence in the case does not show that fact. I am aware that counsel for the defendant admitted, orally, during the trial, that the defendant was proposing to serve the public, but sometimes counsel in a case admit more than the facts warrant, and I think that may be correctly said here. I am also aware that Sec. 3 of the public utilities act defines a common carrier and therefore a public servitor, but I think it may be set down as a sound proposition that you can not make a private telephone line an instrument of public utility by an act of the legislature. Whether the defendant was about to engage in the public service depends upon the nature and character of the business. I can not better express what I desire to say upon the subject than by quoting from the brief of counsel for the plaintiff, and citing some authorities set out in that brief:

"The articles of incorporation of defendant company throw no light on the question as to whether defendant is to conduct a private business or a public business. If the business is private, the public is not interested and has no control over it. A private telephone line may easily be constructed and operated.

"Defendant may, when incorporated, intend to carry on a public business, but is under no obligation, by reason of its charter to do so. It may at any time change its intention and make its business private. It may intend when beginning the construction of its telephone plant to serve the public, but be-

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fore it is completed it may make arrangements which will constitute its service a purely private business.

“To constitute the business a public business there must be a public profession of intention and ability to serve the public. Wyman, Pub. Serv. Corp. Sec. 221, says: ‘It is always a question upon the whole proof in the particular case whether the proprietors of the business have done enough to give people generally the impression that they are at the disposal of the public.’ Again, Sec. 200, Wyman says: ‘Even one who has acquired a virtual monopoly is not forced into public service against his will; it is only when he has held himself out in some way as ready to serve that he is bound thereafter to deal with all indiscriminately.’ Again, Sec. 207: ‘While preparation for establishing the service are going on the business should not be regarded as yet upon a public basis. Thus, where a railroad is under construction and not yet publicly open for passengers, it is not a common carrier of passengers.’”

And in *Munn v. Illinois*, 94 U. S. 113 [24 L. Ed. 77], the court says:

“This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what is without its operative effect. Looking then, to the common law, from whence came the right which the constitution protects, we find that when private property is ‘affected with a public interest, it ceases to be *juris privati* only.’ This was said by Lord Chief Justice Hale more than two hundred years ago in his treatise *De Portibus Maris*, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but so long as he maintains the use, he must submit to the control.”

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The same principle is announced by our Supreme Court in the case of *East Ohio Gas Co. v. Akron*, 81 Ohio St. 33 [90 N. E. Rep. 40; 26 L. R. A. (N. S.) 92; 18 Ann. Cas. 332].

Our conclusion is, the burden being upon the plaintiff to prove the facts of its petition by a preponderance of the evidence, that the evidence in the case is not sufficient to sustain the allegation that the defendant was about to engage in the public service; that the proposed telephone system of the defendant, so far as the evidence shows, to the contrary, was merely a private telephone plant for the use of the stockholders of the defendant company.

When the case was reached for trial it was stated by counsel that they would not offer any evidence upon the question or issue of whether the plaintiff company at the time of filing the petition was rendering adequate telephone service. Counsel stated that that was a question that would properly come before the public service commission of the state, upon an application made to it by the defendant for the certificate provided for by the act; that it was not a question involved in this suit, but as we construe Sec. 54 of the act, it is only where there is already a telephone plant in the field in operation and rendering adequate telephone service that a new company is required to secure the certificate from the public service commission.

The language of the act is, "No telephone company shall exercise any permit, right, license or franchise that may have been heretofore granted," etc., "where there is in operation a telephone company furnishing adequate service."

The converse of that is to be understood, we think, that if there is another telephone company in the locality pretending to serve the public and is not rendering adequate telephone service, the certificate of the commission is not required.

It was deemed important by the plaintiff to aver in its petition the fact that it was rendering adequate service in the following language:

"That continuously since said first day of September, 1904, to the present date the plaintiff has operated said telephone

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plant in sending and receiving telephone messages over its said line, and has during all of said time been engaged in the business of transmitting telephone messages as a common carrier, and during all of said time plaintiff has furnished to the public and to all persons requesting telephone service over said line adequate service; and has continuously operated its said plant and line during twenty-four hours of each day, and at all times has maintained its exchange open for service both day and night, and during all of said time plaintiff has furnished and maintained a complete and adequate service to all of the localities and communities reached by its said plant and line."

This case is submitted to the court upon a general denial of all the allegations of the petition except those that were admitted by counsel in advance of the trial. This fact was not admitted by the defendant. We are unable to agree with counsel at this time that that allegation has no importance in this petition. We think it is a necessary averment and being traversed by denial must be sustained by proof. There was no proof offered on this issue and upon that ground, if no other, we think the judgment in this case should be for the defendant. On that ground and upon the ground that the facts in this case do not show that the defendant company was about to engage in the public service, we dissolve the temporary injunction heretofore granted and dismiss the petition at the costs of plaintiff.

After the temporary injunction had been allowed in this case some of the stockholders of the defendant company, who had discontinued the use of plaintiff's telephones, desiring to communicate with each other by telephone, came to the city of Newark and obtained the advice of counsel whether the erection of some poles and installing of some telephones so that certain families could be enabled to communicate with each other would be a violation of the temporary injunction. They were advised by their attorney that it would not be a violation. Thereupon they proceeded to erect some poles and to string wires thereon and installed in the homes of some of the stockholders about twenty-five telephones. There were five or six

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telephones on each line and there were four or five lines in all. No line could communicate with any other but the persons upon each line could only talk to a few phones constituting that separate and individual line. There was no switch-board used and no manner or means by which the telephone could be used except for the purpose of talking one neighbor with another. Upon learning these facts counsel for the plaintiff filed against the defendant company and certain others who had telephones placed in their homes and some who had assisted in the construction of the line a charge of contempt of court and that phase or branch of the case was submitted at the same time the main case was tried.

Nearly all the persons who were charged with contempt testified in the case and freely and frankly stated all the facts within their knowledge. It appeared that they are farmers and many of them are brothers and it appears that some of the lines constructed were for the purpose of enabling one brother to talk to another, and possibly, in addition to that to some one or two of his neighbors. They all stated that they had no intention or desire to violate the order of this court; that they would not have done anything that in their opinion could have possibly been construed as a violation of the temporary injunction; that they relied on the advice of their attorney and did only what he advised them they might properly and safely do.

The court was impressed with the honesty and frankness of these defendants and believes that every word testified to by them was the truth as nearly as the testimony of witnesses can state it.

It is the opinion of the court that the defendants ought not to be held guilty of contempt of court for the reason, first, that the facts do not show that the defendants did any act or thing that was in violation of the temporary injunction; and further, **under the circumstances, if there was any doubt about that this court would be inclined to resolve that doubt in favor of the defendants and discharge them from the charge of contempt of court.**

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We dismiss the charge of contempt against the persons named in the written charge filed. The entry in this case may show that motion for new trial is overruled with exceptions noted.

GAS—MUNICIPAL CORPORATIONS.

[Licking Common Pleas, January Term, 1911.]

GRANVILLE (VIL.) V. CRAWFORD NAT. GAS & FUEL CO.

1. Right of Council to Fix Price of Gas, upon Failure of Gas Company to Accept Terms of Ordinance.

A municipal council, having fixed the price of gas for a period of ten years pursuant to the provisions of Gen. Code 3983, may, from time to time, after the expiration of such period, fix the rate by ordinance; hence, a denial by a gas company of the right in council to pass such an ordinance is demurrable.

2. Denying Passage of Ordinance Pleaded for Want of Information not Good Form.

An answer by a gas company, refusing to accept the terms of an ordinance fixing the price of gas, denying for want of information, the passage of the ordinance pleaded in the petition and admitting notification of such ordinance passed, is not proper pleading and not in good form.

DEMURRER to answer.

A. A. Stasel, for plaintiff.

L. B. Denning, for defendant.

SEWARD, J. (Orally.)

This case is submitted to the court upon a demurrer to the answer. The petition alleges—and the demurrer searches the record, and, therefore, the court refers to the record as it is—the petition alleges the passage of an ordinance in 1898, whereby a franchise was granted to the defendant company, embracing certain rights and privileges as to the laying of gas mains and pipes through the streets and in the village of Granville. It alleges further that the defendant agreed to supply the village and its inhabitants with gas at twenty-five cents per thousand cubic feet; that the defendant accepted the terms of the ordi-

*Reversed, on appeal, by circuit court, March term, 1911.

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nance within ninety days and entered upon the filling of its contract by furnishing gas at twenty-five cents a thousand cubic feet; that this contractual relation was made for the period of ten years, under the statutes providing for such matters; that on June 2, 1908, council duly legally passed an ordinance fixing the price, which the company should have the right to charge for gas, at fifteen cents per thousand cubic feet for ten years, and providing that consumers should have the option to take by meter or flat rates, and providing the price at flat rates—the maximum price beyond which the company would not have the right to charge.

The answer contains four defenses. The first says that it has no knowledge of the due and legal passage of the ordinance and denies the same, and demands proof.

The ordinance is set out briefly in the petition, and the answer admits that it was notified of its passage, but avers that it never accepted its terms, but expressly repudiated the same.

I do not think that the defendant has the right to come into court, where a record is pleaded, and say that for want of information it denies the allegation of the petition as to that record.

The ordinance is pleaded, and alleges that the company was notified of the passage of the ordinance, and I do not think it is good form for it to come in and say, after the ordinance is pleaded, and notice given to it of the passage of the ordinance—I do not think it is good form for it to say that it denies the passage of the ordinance for want of information. The information is at hand, to be procured before the filing of the answer.

The answer denies every other allegation in the petition. I refer to that because of the fact that it might have some influence with the court in reaching a determination upon this demurrer.

The other three defenses raise a constitutional question, and that it: as to the constitutionality of the ordinance passed by the village of Granville. This feature was submitted to the court, and the court investigated it—as to the right of the village of Granville to pass the ordinance.

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It is claimed by the defendant that the village of Granville has no right to pass an ordinance which binds the company without its acceptance of the provisions of the ordinance.

General Code 3982 provides:

“ The council of a municipality in which electric lighting companies, natural or artificial gas companies, gas light or coke companies, or companies for supplying water for public or private consumption, are established, or into which their wires, mains or pipes are conducted, may regulate from time to time the price which such companies may charge for electric light, or for gas for lighting or fuel purposes, or for water for public or private consumption, furnished by such companies to the citizens, public grounds, and buildings, streets, lanes, alleys, avenues, wharves, and landing places, or for fire protection. Such companies shall in no event charge more for electric light, natural or artificial gas, or water, furnished to such corporation or individuals, than the price specified by ordinance of council. The council may regulate and fix the price which such companies shall charge for the rent of their meters, and such ordinance may provide that such price shall include the use of meters to be furnished by such companies, and in such case meters shall be furnished and kept in repair by such companies and no separate charge shall be made, either directly or indirectly, for the use or repair of them.”

This section of the statute provides for the regulation of the price at which gas may be sold by the defendant company.

The next section, Gen. Code 3983, fixes the right of the company to enter into a contractual relation for the period of ten years.

“If council (now notice the wording of the beginning of the section) fixes the price at which it shall require a company to furnish electricity or either natural or artificial gas to the citizens, or public buildings or for the purpose of lighting the streets, alleys, avenues, wharves, landing places, public grounds or other places or for other purposes, for a period not exceeding ten years, and the company or person so to furnish such electricity or gas assents thereto, by written acceptance, filed in the

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office of the auditor or clerk of the corporation, the council shall not require such company to furnish electricity or either natural or artificial gas, as the case may be, at a less price during the period of time agreed on, not exceeding such ten years."

These two sections of the statute provide that council may regulate the price, and that if they regulate the price for the period of ten years, and if the company accepts the price fixed by council, by ordinance, that that makes a binding contract with the company for ten years, and the council can not interfere with the binding force of that contract until the ten years have expired. That is, they can not fix any different rate. The rate is established by the passing of the ordinance by the council, and the acceptance of the provisions of the ordinance by the company. The rate is fixed and established for ten years, and they can not after that change it until the expiration of ten years. But if the company fails to accept the provisions of the ordinance, then council may regulate it from time to time, or from year to year; because there is nothing that prevents the regulation of the price of gas by the city council except the acceptance of the provisions of the ordinance of the council, making it a binding contract for ten years.

I am cited to *Logan Nat. Gas & Fuel Co. v. Chillicothe*, 65 Ohio St. 186 [62 N. E. Rep. 122]. That is a case where the city of Chillicothe passed an ordinance in 1889, fixing the price which should be charged for gas through the meter. They fixed no rate except a flat rate. They left that with the gas company, and most of the citizens were using gas by flat rate. This ordinance was passed on February 11, 1889, I believe. In September after that, they attempted to fix the rate for gas by using it at flat rates, and the Supreme Court held that they could not do that. The court does not think that that is binding in this case. It is easily distinguishable from the case at bar.

Defendant's counsel suggests, in his brief, that if the court should find that the village had the right to pass this ordinance—and the court does so find—that the question of the reason-

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ableness of the price is not raised. The court does not pass upon that. But the court holds that the village had the right to pass the ordinance that it did pass, and a decree may be entered for plaintiff here, with notice of appeal and bond.

SCHOOLS AND SCHOOLHOUSES.

[Hamilton Common Pleas, January, 1911.]

*BLUE ASH SPEC. SCH. DIST., SYCAMORE TP. (BD. OF ED.) v.
CONCORD SPEC. SCH. DIST., SYCAMORE TP. (BD. OF ED.).

**Measurement of the Distance Pupils Must Travel to School Along
Most Direct Established Route.**

In determining the distance pupils of a public school must travel in going from their home to the schoolhouse, the measurement should begin at the exit from the curtilage and run thence along the most direct established route by lane or path to the nearest highway and then follow the center line of the highway to the door of the schoolhouse.

Chas. W. Hoffman, for plaintiff.

H. H. Hosbrook, for defendant.

WOODMANSEE, J.

The plaintiff seeks to recover from the defendant compensation, by way of tuition, for three pupils who reside in the district of the defendant, and who for a series of months stated in the petition attended the school maintained by the plaintiff.

The action is brought under the provision of Gen. Code 7735 which reads as follows:

"When pupils live more than one and one-half miles from the school to which they are assigned in the district where they reside, they may attend a nearer school in the same district, or if there be none nearer therein, then the nearest school in another school district, in all grades below the high school. In such cases the board of education of the district in which they reside must pay the tuition of such pupils without an agreement to that effect. But a board of education shall not collect tuition

*Affirmed, Concord Spec. Sch. Dist. (Bd. of Ed.) v. Blue Ash Spec. Sch. Dist. (Bd. of Ed.) 34 O. C. C. 203; no op., 87 O. S. 139.

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for such attendance until after notice thereof has been given to the board of education of the district where the pupils reside. Nothing herein shall require the consent of the board of education of the district where the pupils reside to such attendance."

The agreed statement of facts in this case discloses that the distance from the schoolhouse in the Concord special school district to the home of the children, "as the crow flies," is less than one and a half miles. This statement also discloses that the distance from the nearest corner of the school ground surrounding the schoolhouse to the residence of the children, measured along the most direct public highway and the lane or private right-of-way leading to the residence of said children, is less than one and a half miles. It is also agreed that the distance from the central entrance to the yard surrounding the schoolhouse, along the highway and the lane leading to the residence of the said children, is more than one and one-half miles; and that the distance measured from the school building itself to the intersection of the highway with the said lane, is more than one and one-half miles.

It is doubtful if in the entire state of Ohio another such condition exists. The question for the court to determine, in applying the statute in question in this and like cases is, to establish the rule of law as to how the measurement shall be made.

It would not be proper to measure the distance on a straight line, "as the crow flies," across the fields, as the children, without the consent of the owners of the fields, would thereby become trespassers. Besides, under the provisions of the statutes of Ohio, children who reside in school districts in the country, living more than one half mile from the school, and residing at not a greater distance than one half mile from a public highway, are entitled to be carried to school in a public conveyance, at the expense of the school fund in the district. Necessarily they would be carried thus along the highway. And, whether the children go by public or private conveyance, or whether they walk to and from school, they are expected to

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go by the most direct and convenient highway, and the length of that course determines the distance from home to school.

Therefore, the ruling of the court is that, in estimating the distance from the home to the school, the measurement begins at the exit from the curtilage—ordinarily the front gate—from which, if it is not on the highway, thence along the most direct established route, by lane or path to the nearest highway, thence following the center line of the most direct course in the highway to the door of the school building.

Applying this rule to the case at bar, the court finds that the residence of the three Ferris children in question is more than one and one-half miles from the Concord special school district, and having, for that reason, attended the Blue Ash special school district, the latter district is entitled, under the statute, to be compensated for the time they have so attended said school, after notice in compliance with the statute; and the order of the court will be for the payment of the same.

CORPORATIONS.

[Hamilton Common Pleas, May, 1910.]

W. B. MENTE, TR. V. CLARA B. GROFF.

Dividends Paid by a Failing Corporation Out of Capital and not from Surplus Profits Recoverable from Stockholders.

Dividends paid out of the capital and not from surplus profits may be recovered from the stockholders by a trustee in bankruptcy of the corporation, notwithstanding the distribution was to preferred stockholders and was received by them in good faith.

DEMURRER to answer.

W. B. Mente and *L. D. Scammon*, for plaintiff.

Harper, Allen & Curtis, Philip & S. C. Roettinger, Boyd & Slutes, Kittredge, Wilby & Stimson and *S. O. Bayless*, for defendant.

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BROMWELL, J.

The petition on appeal in this case is brief and is quoted in full, as follows:

"Plaintiff is the duly elected, qualified and acting trustee in bankruptcy of the Hartwell Furniture Company, a corporation organized under the laws of Ohio.

"The defendant, Clara B. Groff, was at the time hereinafter mentioned, the holder of ten (10) shares of the preferred stock of the said the Hartwell Furniture Co.

"On the 29th day of April, 1904, there was paid to said defendant, from the funds of said corporation, the sum of \$17.50; on the 29th day of June, 1905, the sum of \$17.50; on the 19th day of April, 1906, the sum of \$17.50, and on the 7th day of August, 1907, the sum of \$17.50, as dividends upon the ten (10) shares of stock held by said defendant as aforesaid. Neither upon said dates, or at any time during which defendant held said shares of stock did the corporation have any surplus profits, as defined by law, subject to the payment of dividends, and said dividends were, therefore, illegal and void.

"Wherefore, plaintiff prays judgment against defendant in the sum of \$70.00, with interest on \$17.50 thereof from April 29, 1904; on \$17.50 thereof from June 29, 1905; on \$17.50 thereof from April 19, 1906; and on \$17.50 thereof from the 7th day of August, 1907, with interest at the rate of 6 per cent, and for his costs herein."

To this the defendant filed the following answer:

"Now comes the defendant and for answer to plaintiff's petition admits that this case comes into this court on an appeal from the docket of John Marshall Smedes, a justice of the peace in and for Cincinnati township, Hamilton county, Ohio; admits that plaintiff is the duly qualified trustee in bankruptcy of the Hartwell Furniture Company, an Ohio corporation; admits that she was at the time mentioned in said petition the holder of ten shares of preferred stock of the Hartwell Furniture Company, which stock was fully paid and nonassessable; admits that she received, as dividends, the sums of money at or about

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the times specified in said petition, and that said dividends were not paid out of any surplus profits of the company.

"Further answering, defendant says that the Hartwell Furniture Company was for many years engaged in the manufacture and sale of furniture in the city of Cincinnati, and up to a short time before its failure was solvent, and at the times when said dividends were paid, other than the dividends paid in the year 1907, had assets more than sufficient to pay all of its debts and liabilities.

"Defendant states further that she received said dividends in good faith, and did not believe that said company at any time prior to its failure was without assets more than sufficient to pay all of said debts and liabilities.

"Wherefore, she prays to be hence dismissed with her costs herein expended."

The following are the provisions of the statute in regard to dividends of Ohio corporations:

3269. "Sec. 1. [*Corporate dividends to be paid from surplus profits only.*] Be it enacted by the General Assembly of the State of Ohio, That it shall not be lawful for the directors of any corporation organized under the laws of this state to make dividends except from the surplus profits arising from the business of the corporation.

"Sec. 2. [*Unpaid interest due corporation not to be included in profits.*] In the calculation of the profits of any corporation previous to a dividend, interest then unpaid, although due, on debts owing to the company, shall not be included.

"Sec. 3. [*Surplus profits; how ascertained; prohibiting advertisement of capital not subscribed and paid in.*] In order to ascertain the surplus profits, from which alone a dividend can be made, there shall be charged in the account of profit and loss, and deducted from the actual profits:

"1. All the expenses paid or incurred, both ordinary and extraordinary, attending the management of the affairs and the transaction of the business of the corporation.

"2. Interest paid, or then due or accrued on debts owing by the corporation.

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"3. All losses sustained by the corporation, and in the computation of such losses, all debts owing to the corporation shall be included which shall have remained due without prosecution, and no interest having been paid thereon for more than one year, or on which judgment shall have been recovered, and shall have remained for more than two years unsatisfied, and on which no interest shall have been paid during that period; and no such corporation shall advertise a larger amount of capital stock that has actually been subscribed and paid in; also, shall not advertise a greater dividend than what has been actually earned and credited or paid to its stockholders or members."

It would seem that the language of the statute is so plain that there could be no disagreement as to its meaning. It first limits the declaration of dividends to surplus profits; it then proceeds to state the manner of determining such surplus profits, using the significant language that from such profits alone dividends shall be made. It does not permit the declaration of dividends out of capital stock nor assets except as the latter may be an increment to the original capital.

The restriction upon the authority of directors to declare dividends out of surplus alone, even in the absence of a specific statute such as we have, is recognized by practically all of the text book writers upon corporations and stockholders, and is supported by numerous decisions in other states. Thus Cook, Stock & Stockh. Sec. 546, uses this language:

"A dividend can lawfully be made only out of net profits. The payment of it must leave the capital stock of the company intact and unimpaired, or the dividend itself will be held fraudulent and void."

This citation fairly represents the view of the authorities.

It is not intended, however, that all of the surplus profits of any year shall be distributed as dividends, that being a matter of discretion with the directors, having full knowledge of the condition of the business and its future necessities, nor, on the other hand, are the directors prohibited from declaring dividends out of accumulative surplus profits of previous years, even where there have been no surplus profits for the particular year

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in which the dividend was declared or, as stated by the same author in the same section :

“Profits earned and accumulative in times of prosperity may properly be paid out as dividends subsequently at a time when no dividends have been earned.”

And again, in Sec. 547, we read :

“As already shown, a dividend can be lawfully declared only when sufficient net profits have been earned to pay that dividend. Accordingly a dividend paid wholly or partly from the capital stock is illegal and subjects the corporation and the shareholders who are parties to it to serious liability. It is the well determined doctrine of the courts of this country that capital stock is a trust fund to be jealously preserved intact for the benefit of corporate creditors. Hence the rule has been firmly established that, where dividends are paid in whole or in part out of the capital stock, corporate creditors, being such when the dividend was declared, or becoming such at any subsequent time, may, to the extent of their claim, compel the shareholders to whom the dividend has been paid to refund whatever portion of the dividend was taken out of the capital stock. In this country shareholders are bound to take notice of the true character and condition of the capital stock and they can not escape liability by reason of their ignorance. * * * If a dividend has been paid out of the capital stock shareholders are conclusively presumed to have known it and are liable to an action for a re-payment. They can not claim to hold the position of innocent or *bona fide* holders.” (Citing numerous authorities.)

To the same effect is the statement of Clark & Marshall, Corporations, Sec. 528b, p. 1636 :

“If the directors of a corporation declare and pay a dividend to its stockholders when there are no profits out of which a dividend may be lawfully declared, the stockholders have no right to retain the money received by them, and it may be recovered from them by the corporation in an action for money had and received, or by an assignee in bankruptcy or receiver of the corporation, or in equity by creditors or a receiver, or

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dissenting stockholders. If a corporation refuses to sue to recover dividends paid out of the capital stock, a stockholder may file a bill to compel repayment.

"To sustain such a recovery there need not have been any bad faith or negligence in declaring the dividend. Nor need the stockholders have known that the dividend was declared and paid illegally. However their intention may have been, they are not in a position of *bona fide* holders, for they are bound to know the condition of the corporation, or, rather, they are chargeable with knowledge of its condition.

"The fact that the statute makes directors individually liable to a corporation or its creditors for wrongfully paying dividends when there are no profits available for the purpose does not affect the liability of the stockholders to repay dividends wrongfully received by them, and, notwithstanding such a statute, the liability of the stockholders may be enforced in equity by a receiver of a corporation."

The last two paragraphs of the above citation bear directly on the allegation of good faith set up in the answer and upon the point made by argument that inasmuch as R. S. 3269-4 (Gen. Code 8728) makes each director violating or concerned in violating the three previous sections, personally liable for any violation of said previous sections, the stockholders receiving such dividends in good faith and without knowledge of their illegality can not be required to return them.

The question of the knowledge of the stockholders as to the condition of insolvency of a corporation is disposed of by our own Supreme Court in the case of *Barrick v. Gifford*, 47 Ohio St. 180, 186 [24 N. E. Rep. 259; 21 Am. St. Rep. 798].

"Stockholders have the means of knowing the condition of their company much better than creditors, and if the company continues to do business upon an insolvent basis, it should be regarded as permitted by the stockholders, as the directors and officers of the company derive their authority from and are the agents of the stockholders."

It is a little remarkable that the exact question raised in this case does not seem to have been passed upon, so far as any of

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the printed reports show, by any Ohio court. In a recent case, *De La Croix v. Concrete Steel Co.* 19 Dec. 489 (8 N. S. 496), decided by Judge Gorman of our court, it is taken for granted that the dividends are payable only out of the surplus profits as defined by the statute, and in the case of *Meisse v. Loren*, 6 Dec. 258 (4 N. P. 100), syllabus 3, we find the statement that:

“The doctrine that the capital stock and other property of the corporation is a trust fund for the payment of the debts of the corporation if followed by the American courts and the courts in Ohio.”

I have examined the cases cited by counsel for the defendant, viz., *Miller v. Bradish*, 69 Iowa 278 [28 N. W. Rep. 594] ; *Reid v. Manufacturing Co.* 40 Ga. 98, 103 [2 Am. Rep. 563] ; *McLean v. Eastman*, 21 Hun. (N. Y.) 312; *McDonald v. Williams*, 174 U. S. 397 [19 Sup. Ct. Rep. 743; 43 L. Ed. 1022] and *Lawrence v. Greenup*, 97 Fed. Rep. 906 [38 C. C. A. 546], and do not believe that the decisions are applicable to the case before us, for the reason that they are based upon statutes not similar to those in Ohio. The Iowa statute, Sec. 1072, upon which the case of *Miller v. Bradish* was decided, reads as follows:

Sec. 1072. “The payment of dividends which leaves insufficient funds to meet the liabilities of the corporation, shall be deemed such fraud as will subject those concerned to the penalties of the preceding section; and such dividends, or their equivalent, in the hands of the individual stockholders, shall be subject to such liabilities.”

Construing the word liability as used in this statute the court said, in that case (page 281):

“We think that the capital stock in one sense is a liability of the corporation, and yet it is not adept * * * the word ‘liability’ as used in the statute is synonymous with ‘indebtedness.’ ”

The section referred to, 1072, which is now Sec. 1621, among other things provides that—

“If the directors or other officers or agents of any corporation shall declare or pay any dividend * * * which would diminish the amount of its capital stock, all directors, officers

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or agents knowingly consenting thereto shall be jointly and severally liable for all the debts of such corporation then existing, but dividends made in good faith before knowledge of the occurring of losses shall not come within the provisions of this section."

Two things will be noticed in regard to the last citation:

First. That it makes depreciation of the capital stock, by means of dividends declared therefrom, unlawful and

Second. That it makes the directors liable only when they have knowledge of the fact that the dividend will cause an impairment.

In passing it may be noted that we have no such provision in our statute.

In the case of *Reid v. Manufacturing Co, supra*, the court said:

"But we will not say that in a proper case, where the corporation is insolvent, and the capital stock, upon the faith of which the credit was given, has become insufficient for the payments of the debts of the company, the case might not be made where a court of equity would enjoin the payment of future dividends to the stockholders till the debts are paid. Nor do we question the right of creditors, in a court of equity to compel stockholders to refund dividends made to them out of the stock itself. The whole capital stock is a trust fund for the payment of the debts contracted on the faith of it, which the stockholders can not divert from that object by distributing it as dividends or otherwise dividing it among themselves."

In the case of *McDonald v. Williams, supra*, the decision was based upon Sec. 5204, U. S. Rev. Stat., and the two syllabi seem to be confined to the question of knowledge and good faith on the part of the stockholders in accepting illegal dividends. These syllabi are as follows:

"1. A receiver of a national bank can not recover back from the stockholder a dividend paid to him, not out of the profits, but entirely out of the capital, when such stockholder receiving such dividend acted in good faith, believing the same to be paid out of the profits made by the bank, and when the

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bank at the time such dividend was declared and paid was solvent.

"2. A stockholder by the mere reception of his proportionate part of such dividend does not withdraw any of the capital of the bank within the meaning of Sec. 5204, U. S. Rev. Stat."

But the court in its opinion, on page 404, somewhat impairs the force of syllabus 1 by saying:

"But we do not wish to be understood as deciding that the doctrine of a trust fund does in truth extend to a shareholder receiving a dividend, in good faith believing it is paid out of profits, even though the bank, at the time of the payment, be in fact insolvent. That question is not herein presented to us and we express no opinion in regard to it. We only say that if such a dividend be recoverable it would be on the principle of a trust fund."

The necessity of keeping the capital unimpaired is set out in Sec. 5205, U. S. Rev. Stat., which provides, among other things, that:

"Every association which shall have failed to pay up its capital stock as required by law and every association whose capital stock shall have become impaired by losses or otherwise, shall, within three months after receiving notice thereof from the comptroller of the currency, pay the deficiency in its capital stock, by assessment among the shareholders *pro rata* for the amount of capital stock held by each."

And it was to this last named statute that the court referred, on page 407, as one of the reasons for not requiring the individual stockholders to refund dividends to pay debts when it said:

"As the statute has provided the remedy under Sec. 5205 for the impairment of the capital, which includes the case of an impairment produced by the payment of a dividend, we think the payment and receipt of a dividend under the circumstances detailed in the question certified, do not permit of its recovery back by a receiver appointed on the subsequent insolvency of the bank."

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The decision in the case of *Lawrence v. Greenup, supra*, was based upon the same statute and does not seem to be applicable to the facts in this case.

The fact that the defendant is a preferred stockholder is immaterial, as the statute is not limited to dividends declared on the common stock, but refers to dividends of all kinds.

In this connection see also *Baltimore & O. Ry. v. Smith*, 48 Ohio St. 219.

A case not exactly similar to that which we are considering is *Ohio College of Dental Surgery v. Rosenthal*, 45 Ohio St. 183 [12 N. E. Rep. 665], which was an action to recover interest claimed to be due by the holder of a certificate in said college issued February 16, 1858, the language of the certificate being as follows:

"This is to certify that J. B. Smith, M. D., is entitled to one share of the real estate property of the college, drawing an interest of 6 per cent, and transferable only in accordance with the constitution of the college association."

The money received from the sale of these certificates was invested in real estate which was to be used in carrying out the purposes of the association. No interest had ever been paid on this certificate nor had the association made any profits. The court said, on page 193:

"The suggestion that these dentists, while pretending to set on foot an enterprise for the maintenance of a college for instruction in the very important and useful science of dental surgery, were really concocting a scheme to constitute themselves pensioners or annuitants upon the college, and hence upon each other, to the extent of six dollars a year for each certificate, involves too grave a reflection upon either their good faith or their sanity to justify us in reaching such conclusion without a clear expression of such a purpose. The improbability, if not the absurdity of such a construction of these certificates will become apparent when we reflect that these pensions or annuities could only be paid out of the capital of the college. An attempt to enforce their collection would inevitably involve the entire enterprise in hopeless ruin."

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On page 194 the court says:

"That promises by a corporation to pay its members interest on their shares out of the capital are void, is abundantly established." (Citing a number of authorities.)

Substituting the word "dividend" in place of "interest" in these last citations we should have a case very similar to the one involved.

The conclusion which I reach from the authorities is:

First. That the capital stock must not be impaired by the declaration of dividends therefrom, but must be kept intact to meet the demands of creditors and for the management of the business.

Second. That if such capital stock is unimpaired, dividends may be declared within the discretion of the board of directors out of surplus profits, whether earned during the current year or carried over from any former year.

Third. That even if no surplus profits have been earned for any current year, dividends may be declared from the accumulated and undivided profits of any former year.

Fourth. That in the case at bar the various dividends alleged to have been paid to the defendant in this case were, as a matter of fact, paid out of the capital and not out of the surplus funds.

Having reached this conclusion, in my judgment the plaintiff is entitled to have the demurrer to the answer sustained, and, in case defendant does not desire to plead further, to have judgment entered accordingly.

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BANKRUPTCY—PRINCIPAL AND AGENT.

[Superior Court of Cincinnati, June 4, 1909.]

FRED C. ANDREWS, TR. OF FRED H. WILLIAMS, v. KRIPPENDORF-DITTMAN CO. AND FRED H. WILLIAMS.

Commissions Due Bankrupt Salesman on Unfilled Orders Payable to Trustee after Deducting Advances of Salary and Travelling Expenses.

A trustee in bankruptcy may collect, and apply to the claims of creditors, commissions on orders sent in by a salesman prior to his bankruptcy but not yet filled by the house employing him, from which monthly payments of salary and travelling expenses advanced by his principal are deductible.

George B. Fowler and Morison R. Waite, for plaintiffs.

A. B. Hall, for Fred C. Andrews.

Morse, Tuttle & Harper, for the Krippendorf-Dittman Co.

SPIEGEL, J.

Two questions present themselves to the court in the case at bar: the first of law; the second of fact.

First. The defendant, Fred H. Williams, was engaged by the codefendant the Krippendorf-Dittman Co., as travelling salesman on a commission basis of 5 per cent on all orders taken by him and afterward filled by the company. If not filled by it, no commission arose. The evidence shows that, prior to his bankruptcy, orders upon which his commission amounted to \$1,993.94, were sent in by Mr. Andrews, but were not filed by the company until after his bankruptcy.

Query: Do these commissions become the property of the creditors, through the trustee in bankruptcy, the plaintiff? I unhesitatingly answer, yes. The rule in our jurisprudence, settled by a long line of cases is, that a contingent debt founded on an existing contract is property which is assignable. In the case of *Wright, In re*, 151 Fed. Rep. 361, afterward affirmed by the circuit court of appeals, 157 Fed. Rep. 545, a case arising upon renewal premiums of an insurance agent, becoming due in the distant future, Judge Hazel says:

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"For we have interests accruing under a contract which are of value to the insurance company and to the bankrupt and to his estate. The only question is whether they are available for the payment of the bankrupt's debts. * * * If they are property which can by any means be transferred, the creditors of the bankrupt are entitled to the benefit of them, however little they may bring. Marketability and assignability are quite distinct. Upon the face of the papers it would seem that the bankrupt had an interest in this contract which should be made available for the payment of his debts. Courts should not be swift to find reasons why creditors should not receive the benefit of all a bankrupt's assets.

"It may be conceded that this contract as a whole is based upon personal trust and confidence, and is not assignable. But there is a difference between an absolute assignment of a contract and an assignment of rights under a contract. The personal confidence which precludes the transfer of rights arising out of a contract must be involved in the nature of the rights themselves. It is not ordinarily involved in the right to receive moneys due or to become due under a contract, and this right is generally assignable without the consent of the other party. * * * The right to receive the renewal commissions under the present contract, which is the right involved in the question certified, seems not to involve personal confidence. The contracts of insurance have already been obtained. The collection of renewal is largely a ministerial act." See, also, *Porter v. Dunlap*, 17 Ohio St. 591; *Rodijkeit v. Andrews*, 74 Ohio St. 104 [77 N. E. Rep. 747; 5 L. R. A. (N. S.) 564; 6 Ann. Cas. 761].

Second. The second question presented is one merely of a finding of fact. Were the monthly payment of salary and travelling expenses to be deducted from the commissions of Mr. Andrews or in addition thereto? The testimony of Mr. Wm. P. Shawe, the treasurer of the Krippendorf-Dittman Company, his brother, Edward A. Shawe, the bookkeeper and cashier thereof, the statements sent by the concern to Mr. Andrews long prior to his involuntary bankruptcy convince me that these

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payments were advancements, to be deducted from his commissions.

A judgment may be entered in accordance with this opinion.

INTERPLEADER.

[Licking Common Pleas, April Term, 1909.]

NEWARK (BD. OF ED.) v. THOMAS F. COULTER ET AL.

Upon Equitable Interpleader Whole Fund Required to be Brought Into Court.

The defendants to an action in the nature of an equitable interpleader have the right to insist that the whole fund shall be brought into court and that the petition shall so show, and a motion will not lie to strike from their answers matter which raises an issue with the plaintiff as to whether there is not a larger fund in his hands than he has admitted in his petition.

David M. Keller, for plaintiff.

Flory & Flory, Norpell & Norpell, B. F. McDonald, S. L. James, Kibler & Montgomery, Smythe & Smythe, A. A. Stasel, Jones & Jones, Frank A. Bolton, for defendants.

A. S. Mitchell, Special Master Commissioner.

SEWARD, J. (Orally.)

This case is submitted to the court upon a motion to strike out certain matters in the answers of various defendants. The matter sought to be stricken out seeks to raise an issue with the plaintiff as to whether or not there is not more in its hands, due the principal contractor, than it admitted in the petition.

These proceedings are in the nature of an equitable interpleader, brought by the holder of a fund, in which it is sought to force those who are made defendants to interplead between each other as to their respective claims against the principal contractor. The subject-matter involved is necessarily the fund in the hands of the plaintiff due the principal contractor on its contract with him.

Now, what are the rights of the defendants who are brought before the court on the petition of the plaintiff? Have they

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the right to insist that the whole fund due the principal contractor, against whom their claim exists, shall be brought into court, and that the petition shall so show?

It is claimed by the defendants that to require them to proceed without raising the question as to whether or not the whole fund is in court would estop them on the principle of *res judicata*; while on the part of the plaintiff it is said that the petition does not specifically allege that the whole fund is brought into court; but counsel say that that would be the claim on the trial of the case.

It is the duty of the person who invokes equitable interpleader to bring the whole fund in, and implore the court's orders as to what disposition he shall make of it as between the claimants. If he does not do that, he can not invoke the order of the court that the defendants be required to interplead, and if the petition is indefinite in that regard, it is not impervious to a motion or demurrer.

The plaintiff must stand perfectly indifferent as to the disposition of the funds, he must have no interest; he is simply a stakeholder for the defendants.

Pomeroy, Eq. Jurisp. Sec. 1325:

"The person seeking the relief must not have nor claim any interest in the subject-matter. He must occupy the position of a stakeholder. He must stand entirely indifferent between the conflicting claimants, and be ready and willing to surrender the entire thing in dispute, or to pay the entire debt, or render the entire duty, without any charge, deduction, or commission as against the one rightfully entitled. He can not mingle up a demand of his own upon the property or fund, with the demand that the other persons shall interplead. As soon as the decree is made that the defendants do interplead, and that he be indemnified, the plaintiff must be wholly without the controversy. The interest, however, which shall defeat the relief, must be in the very thing or fund itself which is the subject-matter of the controversy and of the suit. An interest in the legal question at issue to be determined by the result

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of the litigation will not prejudice the plaintiff's right to the relief."

The fund in dispute here is the amount due the principal contractor from the board of education. The question involved in the motion is not easy to determine, owing to the fact that there is some conflict of authorities.

First Nat. Bank v. Beebe, 62 Ohio St. 41 [56 N. E. Rep. 485], cited by the plaintiff, simply holds that the statutory provisions of Gen. Code 11265 (R. S. 5016) are auxiliary to remedy theretofore existing in chancery, and do not supersede the same.

Johnston v. Oliver, 51 Ohio St. 6 [36 N. E. Rep. 458], it is claimed is applicable to the question by analogy. In that case, the plaintiff brought suit upon a bond which grew out of the following proceedings:

The plaintiff, Mrs. Johnson, brought suit against Mrs. DeHaven and caused an attachment to issue on a certain fund held by one Rosenburgh. The defendant, DeHaven, with Oliver, the person invoking the interpleader, executed their bond to the plaintiff, procuring a release of the attachment, and Rosenburgh turned the fund over to Oliver. Mrs. Johnson brings her suit in this case against Mrs. DeHaven and Oliver on the bond. Oliver filed his affidavit setting out that Mrs. McClure laid claim to the fund in his hands.

The Supreme Court held that the suit was not based upon the fund, but was to recover a judgment on the bond, and if Mrs. McClure had a claim against the fund, there would be no reason why the plaintiff should be required to interplead with her when she was laying no claim to the fund, but to a judgment on the bond.

Owen v. Appel, 68 Ill. 391, is a case involving the same question as is involved here. That is a case where a claim was put into the hands of an attorney for collection. He collected the claim, and some other person made a claim to a part of the fund. He filed a bill of interpleader, alleging that there was a certain amount in his hands, and asking that the court require the defendants to interplead, as to which was entitled to the

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fund. One of them answered and said that he had more in his hands than the petition disclosed.

The court held that the court had jurisdiction, and that the cross bill was properly filed, as it related to the subject-matter of the bill of interpleader, and was necessary to bring all the equities before the court.

In *Williams v. Matthews*, 47 N. J. Eq. 196 [20 Atl. Rep. 261], there is a case on all fours with this case—a New Jersey case, almost identical with the case at bar. That case was for building a house and this is for building an addition to the high school building. The facts in the New Jersey case, as disclosed by the report of the case, are substantially these:

The plaintiff, Williams, entered into a contract with Matthews, one of the defendants, to build three houses for him. The plaintiff makes no further statement as to the agreement between him and Matthews; does not state whether the work has been completed or not; simply says that there is due from him to Matthews \$1,400; that the other defendants have served notice on him to retain the amount of their respective claims. Matthews, in his answer, denies that there is only due him the sum mentioned in the petition, and alleges the sum he claims to be some \$2,000, and insists that a full account shall be taken of the transaction and that the plaintiff should produce, before the court, all books. The other defendants file similar answers. A motion was made to strike out so much of the answers as raises a question as to the amount due as stated in the petition, and as relates to the production of books and papers and an accounting. It might be proper to read what the court say upon that question:

“This purports to be a bill of strict interpleader. The claim of Matthews from which complainants seek relief by this bill is the amount due him on his contract. The claims of the other defendants are for specific portions of that balance, and as they aggregate more than that sum there is a strife as to priorities. The money due on that contract is the subject-matter of the controversy.”

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(The money due on this contract is the subject-matter of the controversy.)

“To sustain such a bill it is necessary that the complainant have no interest in the thing in controversy, and he should in his bill state his own rights so as to negative any such interest. (Story, Eq. Pl. Sec. 292). In his bill he must state his own claims (Mitf. Eq. Pl. 49). The bill, to justify its pretensions as a strict interpleader, should have given so much of the contract, and its execution and payments under it, as would have demonstrated to the court that there was only a certain amount due, with reference to which the complainant was simply a stakeholder. If on complainant's presentation of the case it appears on the face of the bill that it is not a proper case for interpleader, demurrer will lie. But, if the bill should show such a case, a defendant may by answer deny the allegations in the complainant's bill, or set up distinct facts in bar of the suit, and such issue is to be tried according to the practice of the court. Story, Eq. Pl. Sec. 297a; 2 Daniel, Ch. Pr. 1675; *City Bank v. Bangs*, 2 Paige (N. Y.) 570; *Statham v. Hall*, Turn. & Rus. 30. Portions of these answers objected to question the amount stated in the bill to be due on the contract. While it is not a matter over which an issue can be framed for settlement in a suit of strict interpleader, it may be inquired into to ascertain if the action is maintainable; that is, as the only proper decree is that the defendant interplead or the bill be dismissed, the decree can not adjudge this or that amount due, but the amount may have a controlling influence in deciding if the complainant is simply a disinterested stakeholder, and for that purpose be inquired into. There is nothing on the face of this bill to demonstrate this; the averment is made, but no facts are given to verify the statement. If, as was alleged on the argument, the complainant made his own adjustment of his own claims, made allowances to himself, and struck his own balance, over which he asks the defendants to litigate, they are not to be concluded by his averring that such sum is the amount due, and that he is indifferent. They may by answer show he is not so, and is interested in the matter of the controversy.

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"In *Crawshay v. Thornton*, 7 Sim. 391, 397, Sir L. Shadwell, V. C., says: 'Interpleader is where the depositary holds as depositary merely, and the claims are made against him in that character only.'

"Plaintiff was an auctioneer and had sold an estate for one defendant. The other defendant was the purchaser, who had commenced an action against the plaintiff for the deposit. The bill was filed for an interpleader and injunction to restrain the prosecution of the action. It appeared that the plaintiff had received a deposit of eighty-seven pounds." etc.

And they cite a railroad case, *Baltimore & O. Ry. v. Arthur*, 90 N. Y. 234:

"Plaintiff desired to deduct freight, and have defendants interplead as to balance. Court of appeals held action could not be maintained."

The court held that they had no right to interplead; that they must bring the fund into court.

Owen v. Appel, *supra*, is in conflict with *Hamilton v. Stilwaugh*, 5 Circ. Dec. 324 (11 R. 184), which is cited by counsel. The court says, at page 326:

"We are unable to see how we can in this case, as we are asked to do, go into the question whether the city does not hold more than the sum admitted by it to be due to the principal contractors, and enter a judgment ordering them to pay that sum to these claimants. This is an action in the nature of an interpleader brought by the city, admitting a certain sum to be in its hands applicable to the claim of the principal contractors, and asking directions as to its payment to the different claimants. We think that questions of this kind must be settled in a different suit."

Indicating that they must be settled in a suit at law. The court thinks that these motions should be overruled, with exceptions.

By Edward Kibler: Did the court consider the question of the right of the board of education to a jury trial?

The Court: I am inclined to think that this matter should be referred to a master, as to whether they have brought in the

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entire fund, and if they have not done it, under the New Jersey equity case their petition would have to be dismissed. I think it would be the better practice to allege in the petition the contract, and whether it has been completed, how much has been paid on it, and showing conclusively that they bring the whole fund into court.

MASTER AND SERVANT—NEGLIGENCE.

[Hamilton Common Pleas, 1911.]

STELLA SKELTON, ADMRX. v. JUDSON HARMON.

Doctrine of Comparative Risks does not Change Rule as to Assumption of Risks.

The change which has been made by Gen. Code 6245-1 et seq., as to the effect of contributory negligence does not change the rule as to assumption of risk, and where an employe voluntarily and unnecessarily places himself in a position of danger there is an assumption of risk.

MOTION for new trial.

Charles J. Fitzgerald and Horstman & Horstman, for plaintiff.

Harmon, Colston, Goldsmith & Hoadly, for defendant.

HUNT, J.

When the jury returned their verdict in this case the court considered that it was sustained by the evidence and is still of that opinion.

The errors complained of, if errors and if the record would show them still to be such, were not prejudicial. The only one as to which there might be a doubt is the special charge as to assumed risk, given at the request of the defendant. While the statute has changed the rule as to the effect of contributory negligence where such negligence was slight and the negligence of the defendant was greater in comparison, such rule should not be extended beyond its terms and therefore does not change the rule as to assumed risk. Where an employe voluntarily

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and unnecessarily places himself in a position of danger, such act is not only negligence, but in addition thereto is an assumption of risk.

The motion for a new trial is therefore overruled.

INTOXICATING LIQUORS—PERJURY.

[Licking Common Pleas, September Term, 1910.]

STATE OF OHIO V. ORISON HILL.

Indictment for Perjury in Giving Testimony in Sale of Intoxicating Liquor, Defective for Failure to Aver Offense Occurred in Dry District.

Demurrer lies to an indictment for perjury on the part of a witness who falsely stated before the grand jury that he did not know the identity of the person who handed him a bottle of beer, there being no allegation in the indictment that the alleged offense occurred in a district in which it was contrary to law to sell or give away beer or other intoxicating liquor.

DEMURRER to indictment.

Phil. B. Smythe, Pros. Atty., and *William H. Miller*, Asst. Atty. Gen., for plaintiff.

J. R. Fitzgibbon, for defendant.

NICHOLAS, J.

This case is for hearing upon a demurrer to an indictment, charging that this defendant, on August 8, in the present year, when a witness before a grand jury of this county, in a matter material to the issue being tried by said grand jury, did corruptly and willfully depose and declare certain matters, to wit: that he did not know the name or identity of a certain person who gave and handed him, the defendant, on July 8, 1910, a certain bottle of beer, in a saloon conducted by one Lewis Bolton, in this county and state, whereas in truth and in fact this defendant well knew the person who gave and handed him said beer, etc.

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The court is unable to see how this matter can be material to a question being heard by the grand jury at that time, as it does not appear by this indictment that the giving or handing of beer by anyone on that date, in this county, was prohibited by law; and the court can not take judicial notice of a law which has only special application to particular districts or portions of the state.

The legislature has provided for proof that a district or part of the state has been voted dry by special enactment; and it is a well settled principle that an indictment must contain every allegation which is necessary to be proven in order to support a conviction.

That fact being necessary to be proven, it must, therefore, be alleged in the indictment.

By reason of this infirmity in the indictment, the demurrer will be sustained.

CRIMINAL LAW AND PRACTICE.

[Licking Common Pleas, December Term, 1910.]

STATE OF OHIO V. ROBERT CLEVELAND AND EDGAR OWENS.

Plea in Abatement not Proper Procedure in Murder Case for Failure to Designate Number of Jurors in Wheel.

A plea in abatement does not lie to an indictment for murder in the first degree, where based on the ground that the judges of the common pleas court in appointing the jury commission failed to designate the number of names which the commission should place in the jury wheel of persons to serve as grand and petit jurors during the current year.

Phil. B. Smythe, Pros. Atty., and *W. H. Miller*, Assist. Atty. Gen., for plaintiffs.

Jones & Jones, for defendants.

NICHOLAS, J.

These defendants, Robert Cleveland and Edgar Owens, with others, were indicted by the grand jury of the April term of this court for murder in the first degree. To this indictment, each of them has interposed a plea in abatement, in

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which it is alleged that the state ought not to prosecute them further on this indictment, and they set forth as ground therefor that the judges of this subdivision, in their appointment of the jury commission, for the year 1910, failed to designate the number of names which should be placed in the jury wheel of persons to serve as jurors, grand and petit, during the year; that said jury commission, of their own volition placed 270 names in said wheel, and that the grand jury which returned the indictment in this case was drawn from that number.

To this plea, the state has interposed a general demurrer. This demurrer raises the legal question: Does this plea in abatement state a defense to the state's right to prosecute this action to a final conclusion?

Let us first inquire the province of a plea in abatement at the common law.

Thompson & Merriam, Juries Sec. 533, states that "the only objection which can be taken to grand jurors by plea in abatement must be such as would disqualify the juror to serve in any case. In other words, the plea must show the absence of positive qualifications demanded by law."

They further tell us in the three succeeding sections that the plea in abatement was not favored at the common law, and, therefore, must be strictly pleaded.

The qualifications of jurors, both grand and petit, in this state are, that they be citizens of the state and electors of the county in which they are drawn.

As no disqualification of a juror or jurors is alleged in this case as tested by the common law, we must look to the statute law of our state to learn what changes, if any, have been made in this regard.

Gen. Code 13622 (R. S. 7250) provides that a plea in abatement may be made when there is a defect in the record, which is shown by facts extrinsic thereto. This provision is but an announcement of the common law, and it adds nothing to its provisions.

Our own Supreme Court, in construing this section, in the case of *Huling v. State*, 17 Ohio St. 588. says:

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"We think the court below did not err in sustaining the demurrers to the special pleas. Those set up mere irregularities in the manner of selecting and drawing the grand jurors, and do not allege any want of competency in the jurors themselves. Whether the latter kind of objection can be taken by plea to the indictment, is a question upon which there has been much difference of opinion and contrariety of decision. Since the decision of the case of *Doyle v. State*, 17 Ohio 222, it has been settled law in Ohio that such a plea is good in all cases where the objection is to the qualification or competency of the individual jurors. This is as far as we have gone. We have never held, and such is not the practice so far as we know, that mere objections to the manner of selecting and constituting the jury can be taken by plea in abatement. On the contrary, the practice is to require the objection to be taken by challenge for cause, either to the penal or to individual jurors. In England, as well as in the United States, the decided weight of authority is in favor of that practice. In some of the states, as Massachusetts and New York, challenge seems to be the only form of making the objection, even where it goes to the personal disqualification of the jurors. The better opinion, however, seems to be, and the current of authority is to the effect, that irregularities in selecting and impaneling grand jurors, which do not go to their incompetency, can only be objected to by way of challenge, but that their individual incompetency may be pleaded in abatement to the indictment. And this distinction is founded in reason. It is important to the defendant that he should not be subjected to a trial except upon an indictment found by a jury composed of good and lawful men; but, provided they are such good and lawful men, it is matter of no interest to him in what manner they are selected and drawn.

"The manner of selecting and drawing jurors concerns the public rather than the parties in a cause, provided only that irregularities therein do not result in placing in the box jurors who are disqualified. It seems to us, therefore, that the provisions of law for the selection, distribution and drawing of

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jurors, should be regarded as directory, rather than as mandatory and indispensable. They were intended for public convenience, and to equalize the burden of jury service, as well as to insure the selection of competent jurors; and it is only when an irregularity has occurred by which they have failed to accomplish the latter object, that the defendant will be allowed to make the objection by plea. In cases of mere irregularity, he must make it by challenge."

The law of Ohio, therefore, upon this subject being but a mere reiteration of the common law, we are forced to the conclusion that the demurrer to the plea in abatement is well taken, and must, therefore, be sustained.

The pleas in abatement by each of these defendants being the same, the demurrer to each of them must be sustained.

ACTIONS—MUNICIPAL CORPORATIONS.

[Hamilton Common Pleas, December, 1909.]

WARREN BROTHERS CO. v. CINCINNATI (CITY).**1. Failure of City Officials to Pay Contract Estimates on Street Improvement Creates Liability against City.**

Failure of city officials to make a final estimate on completed work or to take the necessary steps leading up to settlement of the claim of a contractor within a reasonable time, creates liability on the part of the city for interest on the fund so withheld.

2. Contractor May Sue City for Damages on Contract Instead of by Mandamus.

A contractor who is unable to obtain a final settlement from a municipality is not limited to an action in mandamus to compel officials to perform their duty, but if he so elects he may have recourse to an action for damages.

DEMURRER.

Louis B. Sawyer, for plaintiff.

Dudley V. Sutphin, for defendant.

Warren Bros. Co. v. Cincinnati.

DICKSON, J.

Heard on demurrer to plaintiff's amended petition for the reason that it does not state facts sufficient to constitute a cause of action.

Plaintiff claims that on October 24, 1905, it entered into a contract with the city of Cincinnati to lay a bitulithic pavement on one of its streets—Fairfax avenue; that the contract was fully completed on its part in December, 1905, and that as the work progressed certain partial estimates were made and paid for, amounting to \$9,514.72; that the defendant wrongfully refused within a reasonable time after the completion of the work to make the certain final estimate, which was the basis for certain required steps in legislation by ordinance, etc., required in the contract and by law, leading up to and ending in final payment in full; that this final estimate was not made until on or about May 23, 1908, and when made was in the sum of \$43,341.97; that by the terms of the contract 10 per cent (\$4,480.88) was withheld, and that the balance (\$29,426.37) was paid in June and August, 1908; that these payments were by agreement made without prejudice to plaintiff's right to damages for delay in making the final estimate, the damages claimed being interest on the various payments thus wrongfully withheld, and amounting in all to the sum of \$4,111.85, the time covered being something over two years.

The making of or refusal to make this final estimate raises squarely the issue in this action on this demurrer. Was the plaintiff or the defendant guilty of the breach of duty in this respect?

It was clearly plaintiff's duty to have finished the street in accord with the terms of the contract. It alleges it did this.

It was clearly the city's duty within a reasonable time after the street was turned over to it as completed to have accepted it and given the final estimate, and at once to have begun the necessary legislation in the premises—or within such reasonable time to have refused so to do.

While it is true that a person dealing with a municipal corporation, a department of the government, must take notice

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that in many respects he deals differently than with another person, individual, and while it is true that many statutes have been passed by the general assembly to protect the public from the evils of both omission and commission by its elected and appointed agents, yet it is also true that in the absence of such statutes a person dealing with a municipal corporation may deal with it as with another person, and such person need not have recourse to the writ of mandamus to compel the city to do its duty, and it will not avail the city that such a person prefers an action in damages.

The failure of the city to do its duty by either accepting or rejecting the work alone makes it amenable to the cause of action set out in the petition; and if liable, damages as interest on the money thus wrongfully withheld is a proper remedy.

The petition states a cause of action.

If the city were right in refusing or delaying the final estimate, these are, or either of them is a substantive defense and may be plead in an answer raising such an issue or issues.

Demurrer overruled.

RESCISSION.

[Hamilton Common Pleas, December, 1909.]

ELLEN LEHAN V. MAUD F. SELLINS.

Purchaser Paying Earnest Money cannot Rescind Contract on Account of Liens against Property Perfected after Sale.

One entering into an agreement to purchase property and paying earnest money thereon can not rescind the contract of purchase and recover the amount paid on the plea of a defect in the title, where the defects complained of consist of judgments rendered against a predecessor in title in suits brought after her death and which did not go to judgment until subsequent to sale and transfer of the property.

Powell & Smiley, for plaintiff.

Denis F. Cash, for defendant.

GORMAN, J.

This case is submitted to the court on agreed statement of facts. It is for the recovery of \$25 earnest money paid by the

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plaintiff to the defendant under a written contract for the sale of real estate, being part of lots No. 57 and No. 58 of Clark Williams' subdivision, in Cincinnati, Ohio, entered into between the plaintiff and the defendant, whereby the plaintiff was to pay the defendant \$1,100 for the property, the title to be good. The plaintiff refused to take the property, upon the claim that the title is not marketable because there is a judgment rendered against one Ann E. Redman by the superior court of Cincinnati, case No. 51676, at the November term, 1906, for the sum of \$55; and another judgment rendered at the same time against the said Ann E. Redman for \$362.50.

Said Ann E. Redman was the owner of the property for which the contract of sale was executed, but she died on November 23, 1902, before the suits were commenced upon which the judgments above mentioned were rendered against her. No service was ever made on Ann Redman, and she was not the owner of the property at the time the judgments were rendered. It is agreed by the parties and by the court that the judgment is absolutely void. There is no other objection to the title. It is contended by plaintiff that this is such a defect in the title to the property as excuses her from the performance of the contract, and therefore she claims to be entitled to recover the \$25 earnest money.

The court is of the opinion that the judgment being absolutely void, and there being no other objection to the title, that this title is a good marketable title and that the plaintiff is not excused from the performance of the contract. It is urged that the buyer should have a title which he can sell without a question of flaw or doubt, and can not only hold, but hold in peace precluded from worry. While this is true, nevertheless, if the court were considering this case as one for specific performance, under the authorities, it would seem to the court that there is no reasonable doubt as to the marketableness of this title. See Maupin, Market. Title Secs. 200-285; also, *Simon v. Vandever*, 155 N. Y. 377 [49 N. Y. 1043; 63 Am. St. Rep. 683]; *Ludlow v. O'Neil*, 29 Ohio St. 181; *Rife v. Lybarger*, 49 Ohio St. 422 [31 N. E. Rep. 768; 17 L. R. A. 403].

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The court has examined the authorities submitted by counsel for plaintiff and defendant, and is forced to the conclusion that the plaintiff in this case is not entitled to recover upon the ground that the title is not marketable.

As to the question of the jurisdiction of the court, raised by the defendant the court is of opinion that that question was settled adversely to the contention of counsel for the defendant in *Rogers v. Pruschansky*, 13-23 O. C. C. 271 (3 N. S. 366).

The judgment of the court therefore is that the defendant go hence without day and recover her costs from the plaintiff.

INSURANCE—PLEADING.

[Cincinnati Superior Court, March, 1910.]

MARY KOCH, NOW LAUBER V. AETNA LIFE INSURANCE CO.

Action on Accident Policy Requires Averment of Accidental Death to Recover.

In an action on a policy of accident insurance it is incumbent on the plaintiff to set forth in the petition such facts as will constitute an accident resulting in the death for which recovery is sought.

Hoffman, Bode & LeBlond, for plaintiff.

John R. Schindel, for defendant.

This is an action to recover on a policy of accident insurance whereby the defendant insured Charles McGarigle against death and bodily injuries effected solely through "external, violent and accidental means."

The petition alleged that "about the latter part of January, 1907, at or near Cincinnati, Ohio, the said Charles McGarigle by external, accidental and violent means received an injury to his head causing a scalp wound resulting in infection," and that said injury caused the death of said McGarigle.

The defendant filed a motion to require plaintiff to make petition definite and certain by stating the place where the accident occurred, and what the accidental, external and violent means were which caused the injury. This motion was granted

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and the plaintiff filed an amended petition alleging that "during the latter part of January, 1907, at Cincinnati, Ohio, the said Charles McGarigle by external, accidental and violent means received an injury to his head as this plaintiff is informed, and therefore alleged, by receiving a fall, cutting his head and fracturing his skull, and resulting in infection and causing his death."

The defendant then filed a motion to require plaintiff to make said amended petition definite and certain by stating: (1) The particular place in Cincinnati, Ohio, where said Charles McGarigle received said fall and said injury to his head; and (2) the facts showing how and in what manner said fall occurred and the cause thereof.

The defendant in support of the motion cited: *Driskell v. Insurance Co.* 117 Mo. App. 362, 367 [93 S. W. Rep. 880]; *McEfresh v. Insurance Co.* 21 Ind. App. 557, 558 [52 N. E. Rep. 819]; *Newman v. Accident Assn.* 15 Ind. App. 29 [42 N. E. Rep. 650]; *New York, C. & St. L. Ry. v. Kistler*, 66 Ohio St. 326, 333 [64 N. E. Rep. 130]; *Tuchochi v. Railway*, 7 Dec. 219 (7 N. P. 276); *Reuter v. Schneider*, 27 O. C. C. 836 (3 O. L. R. 286).

The plaintiff cited the following cases, viz: *Union Ins. Co. v. McGookey*, 33 Ohio St. 555; *Queen Ins. Co. v. Leonard*, 6 Circ. Dec. 49 (9 R. 46); *Hall v. Aid Assn.* 3 Circ. Dec. 284 (6 R. 137); *Kandar v. Aetna Indemnity Co.* 30 O. C. C. 260 (10 N. S. 449); *Travelers Ins. Co. v. Leibus*, 28 O. C. C. 700 (8 N. S. 201); *Kinthead*, Code Pl. p. 686, Sec. 721; *Moody v. Insurance Co.* 52 Ohio St. 12 [38 N. E. Rep. 1011; 26 L. R. A. 313; 49 Am. St. Rep. 699]; *United States Acc. Assn. v. Hubbell*, 56 Ohio St. 516 [47 N. E. Rep. 544; 40 L. R. A. 453].

SHATTUCK, J.

The court has heretofore in this case passed on substantially the same points now presented by this motion. I am of opinion that plaintiff should be required to make her petition more definite in each particular mentioned in the motion. If the plaintiff is able to make her proof at the trial no more definite than she makes the allegations referred to, a court or jury, to which the case may be submitted, would be required to guess

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what the facts were, if a judgment or verdict was returned in her favor. This is an action on an accident policy, not a life policy, and it is incumbent upon plaintiff to set forth such facts as will constitute an accident resulting in the death for which she asks to recover. Motion to make definite and certain granted.

BILLS, NOTES AND CHECKS—FORGERY.

[Hamilton Common Pleas, June, 1910.]

S. GOLDBERG v. PEOPLES BANK & SAVINGS CO.

Bank Paying Check on Forged Indorsement Liable.

Payment of a check drawn to the order of R, was refused by the bank for lack of identification of the holder, who claimed to be R. Thereupon the holder, whose representation that he was R was false, procured from the maker, to whom he was also unknown, an exchange of the original check for two aggregating the same amount as the original check, one made payable to bearer and the other to R. These checks were then presented by the holder to the bank duly endorsed with the name of R, and both were paid. Discovering the fraud perpetrated by the holder, suit was brought by the maker against the bank for recovery of the amount of the check made payable to R. Held: This check was paid without authority, and the loss must be borne by the bank.

C. F. Hornberger and Harry R. Weber, for plaintiff.

Alfred Mack, for defendant.

HUNT, J.

S. Goldberg, having an account with the Peoples Bank & Savings Company, in December, 1908, sent by mail a check to New York for \$94.07, payable to Rudinsky Brothers. On January 6, 1909, a party having possession of said check and claiming to be of the firm of Rudinsky Bros., presented the same at the bank. The paying teller declined to pay the check and directed the party to have S. Goldberg identify him. The holder of the check then requested Mr. Goldberg to cash the check, but he declined to do so. Shortly afterward, Goldberg met the holder of the check on the street. In response to the holder's urgent request for money, Mr. Goldberg then went with him to the Queen City Bank, about two squares from the Peoples Bank, and

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drew two checks on the Peoples Bank in lieu of the first check, one for \$14 payable to bearer and endorsed in blank by S. Goldberg, and the other check for \$80.07 payable to the order of Rudinsky Bros. and delivered both checks to the party, saying, "I will take a chance on you for \$14." The holder of the checks then presented the \$14 check to the paying teller of the Peoples Bank, having previously made thereon the additional endorsement of "Rudinsky Bros." At the same time he again endorsed thereon "Rudinsky Bros." Thereupon the \$14 check was paid by the bank. The holder of the checks then presented the check for \$80.07 for payment, and endorsing "Rudinsky Bros." on such check, received the amount from the paying teller. The holder of the checks then made some explanation to the paying teller as to the reason why the original check was divided into two checks, but Mr. Goldberg knew of no such explanation.

Mr. Goldberg did not communicate with the bank in any way during these transactions, except by way of the checks presented. The holder of the checks was not in fact a member of the firm of "Rudinsky Bros." and had no authority to indorse such name. In this action Goldberg asked for judgment against the bank for the amount of the second check, \$80.07, which was charged against his account.

The law of the case is well settled by the Supreme Court in the following cases:

Dodge v. Bank, 20 Ohio St. 234 [5 Am. Rep. 648]:

"The duty of a banker is to pay the checks and bills of his customer drawn payable to order, to the person who becomes holder by a genuine indorsement; and he can not charge him with payments made otherwise, unless the circumstances amount to a direction from the customer to the banker to pay the paper without reference to the genuineness of the indorsement, or are equivalent to a subsequent admission that the indorsement is genuine, in reliance on which the banker is induced to alter his position."

Armstrong v. Bank, 46 Ohio St. 512 [22 N. E. Rep. 866; 6 L. R. A. 625; 15 Am. St. Rep. 655]:

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"In the absence of a course of dealing or understanding to the contrary between the parties, the duty of a banker is, in all cases, to pay to the person named, or his order, where the terms of the check are such; and he may, and should withhold payment until fully satisfied as to the genuineness of the indorsement."

Practically the same rule is recognized in the case of *Murphy v. Bank*, 191 Mass. 159 [77 N. E. Rep. 693].

The cases of *Robertson v. Coleman*, 141 Mass. 231 [4 N. E. Rep. 619; 55 Am. Rep. 471], and *United States v. Bank*, 45 Fed. Rep. 163, are not inconsistent with the above rules, because in such cases the court finds that it was the intention of the drawer of the check that the money was to be paid to the person to whom the check was given, such person being recognized, or in banker's terms, identified by the drawer as the payee named. Even though the person to whom the check be delivered has authority to receive possession of the check, that does not authorize the bank to pay the check without proper endorsement. *Dodge v. Bank, supra*.

In the case at bar there are no circumstances amounting to a direction by Goldberg to the bank to pay the check without reference to the genuineness of the indorsement, nor was there any prior course of dealing or understanding exempting the banker paying only to the payee as named, or order; nor was there any intention that the check payable to Rudinsky Bros. should be paid to the person to whom the check was given without proper indorsement. On the contrary, the fact that the holder of the first check, after being refused payment for want of identification, came back with the check divided into two checks, one payable to bearer, therefore eliminating the necessity of identification as to such check, the other payable to Rudinsky Bros. was itself notice that Goldberg had refused, or at least, seen fit not to identify the holder as the proper payee of a check payable to Rudinsky Bros. and intended that as to the \$14 check no identification should be required, but that as to the check for \$80.07, identification should be required.

Judgment is therefore given in favor of the plaintiff.

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DIVORCE AND ALIMONY.

[Hamilton Common Pleas, December, 1909.]

BERTHA NOLAN v. JOHN J. NOLAN.

Allowance to Wife after having been Given One-half Interest in Husband's Property.

A husband having deeded to his wife one-half of property accumulated since their marriage, will not be compelled to pay a large sum of alimony in gross out of his remaining share even though the divorce be granted for his aggressions.

Horstman & Horstman, for plaintiff.

Thorne Baker, for defendant.

GORMAN, J.

This is an action on behalf of the wife, Bertha Nolan, against her husband, John J. Nolan, for alimony; the prayer of the petition is in the alternative for a gross sum or an allowance payable in installments, as the court may deem best. The evidence as to the aggressions of the husband and his conduct toward the plaintiff, his wife, are undisputed. In the opinion of the court the plaintiff has made out a case entitling her to alimony, under Gen. Code 11997, on the ground of extreme cruelty.

The defendant offered no evidence to meet the evidence of the plaintiff in support of her averments, and the only question left for the court to determine is whether or not the plaintiff, the wife, shall have alimony, and if so, how much and how shall the same be made payable—in gross or in installments.

The evidence discloses that the only property which the defendant has is a house and lot on Curtis avenue valued at about \$5,400, upon which there is a mortgage for \$2,700 or \$2,800 in favor of the Southern Ohio Loan & Trust Company. He also owns a blacksmith shop and the tools and chattels therein contained, but not the land on which the shop stands. He also owns two horses; one an alleged race horse and the other a driving horse; the value of which horses is problematical, but probably

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his entire personal property does not exceed in value \$500. The wife has the household goods and furniture valued at \$300, but the evidence is not before me as to whether this furniture belonged to the defendant Nolan or to his wife, but presumably it belonged to Nolan.

Some three years ago the husband deeded a half interest in the real estate on Curtis street to his wife, after a suit had been brought by her for alimony and the same dismissed by consent of parties. This real estate was partitioned and sold and bought by a man named Davis for the husband, John J. Nolan, who is now the equitable owner subject to the mortgage above referred to. Mrs. Nolan, the plaintiff, received out of the proceeds of the sale of this real estate about \$2,550. This property was all acquired since the marriage and I am of opinion that the wife was as much instrumental in saving the money which purchased this property as the husband. His habits were such that if it had not been for his wife he probably would not have accumulated enough to buy the property.

The testimony discloses that Nolan owes debts outside of the mortgage, amounting to about \$800 for current bills for supplies for his blacksmith shop.

In view of the fact that the wife has received one-half of the value of the real estate, I do not think that a court fixing the amount of her alimony at this time, if Nolan were owner of this entire property, would allow her more than one-half of the value thereof, which she has already received. But in view of the fact that this one-half interest was a gift from the husband to the wife, although in the opinion of the court Nolan was doing no more than justice to his wife when he gave her this one-half interest, I am of the opinion that the wife should not be allowed a large sum in the way of alimony. The conclusion of the court is that the amount of the arrearages of the alimony which was allowed *predente lite*, to wit, \$10 per week since June 10, amounting to \$200, should be paid and an additional sum of \$400 in gross in full satisfaction of the wife's claim for alimony, making in all the sum of \$600. The sum will be a lien upon the real estate owned by the husband, and the payment of this

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amount shall be made as follows: \$200 now due on account of the alimony *pendente lite* shall be paid in cash, and the remaining \$400 be payable \$100 per year for a period of four years, or the entire amount may be paid at any time before the expiration of four years. A decree may be entered accordingly.

CHATTEL MORTGAGES.

[Licking Common Pleas, September Term, 1909.]

GEORGE W. LANE v. BAILEY & KEELEY.

Knowledge by Subsequent Mortgagee of Existing Chattel Mortgage does not Dispense with Refiling of Original Mortgage Required by Statute.

A chattel mortgage which is not refiled within thirty days prior to the expiration of one year from the date of the first filing, pursuant to Gen. Code 8565, is void as to a subsequent mortgagee in good faith, notwithstanding said mortgagee had knowledge of the existing mortgage at a time previous to the date of the execution of his own mortgage.

DEMURRER to second defense.

SEWARD, J. (Orally.)

This is an action brought to foreclose a chattel mortgage, securing certain notes. The mortgage was made to Bailey and Keeley, but was not refiled within thirty days prior to the expiration of a year from the date of the first filing.

The statute (Gen. Code 8565) provides that where it is not refiled within thirty days prior to the expiration of a year from the date of the first filing, it shall be void as to subsequent creditors and mortgagees in good faith.

This answer admits that the mortgage was not refiled; but the defendants charge that the plaintiff had personal notice and knowledge of the existence of the lien of the chattel mortgage, and that the note secured thereby had not been paid.

In *Day v. Munson*, 14 Ohio St. 488, and *Paine v. Mason*, 7 Ohio St. 198, it is held by the Supreme Court that, where the subsequent mortgagee had actual notice of the existence of the former mortgage at the time he took his mortgage, then he is not

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a mortgagee in good faith; if he had actual notice of the former mortgage, he could not be a mortgagee in good faith, although the mortgage had not been refiled under the statute.

But this allegation is that the defendant further says that the plaintiff, before obtaining the chattel mortgage—not at the time, but before—had knowledge of the existence of the mortgage. The only difference in this case and the case decided in *Paine v. Mason*, *supra*, and *Day v. Munson*, *supra*, is that in those cases the knowledge was alleged to have been had at the time of the taking of the mortgage. In this case he says that he had notice before taking the mortgage. That might have been and he might have been advised, and had reason to believe, that it had been paid before he took his chattel mortgage.

This demurrer may be sustained.

NEGLIGENCE—STREET RAILWAYS.

[Hamilton Common Pleas, October 13, 1910.]

ABBIE F. ADAMS v. CINCINNATI TRACTION CO.

Starting Street Car while Passengers are Changing Position on the Car but not Alighting not Negligence.

When a passenger on a street car is in the act of changing from a place or position of equilibrium on the car for a like place or position on the ground or street, starting the car is negligence, but if such car is stopped for passengers to get off and a passenger is changing position on the car and not from the car to the ground for the purpose of alighting, it is not negligence to start the car.

MOTION for new trial.

W. S. Little and Jones & James, for plaintiff.

Rufus B. Smith, for defendant.

HUNT, J.

A verdict for the plaintiff was given in this case and a motion for a new trial has been filed.

Plaintiff in her petition sets up two causes of action of different dates but both for the alleged premature starting of a car after stopping on Montgomery road for Brewster avenue. The

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damages sustained by the plaintiff were the result of the occurrence of the prior date. The damages, if any, suffered at the later date were trivial, but the second cause of action not having been withdrawn by the plaintiff, any charge given or refused, pertaining to such cause of action, must be seriously considered, because a finding of the jury thereon would determine whether the verdict should be for the plaintiff or defendant, and *non constat* but that the jury found for the plaintiff on the second cause of action and assessed damages as of the first cause of action.

The plaintiff's evidence upon her second cause of action tended to establish the fact that after the car stopped for Brewster avenue at the signal of plaintiff and others, plaintiff closely following the passengers who were getting off, stepped from the inside of the car to the rear platform holding on to the hand rail; that before she stepped from the platform to the step of the car, the car started, but without any jerk, and plaintiff's arm already injured, was further injured by the pull caused by the moving of the car. Defendant's evidence is to the effect that the car did not stop and then start at Brewster avenue before plaintiff got off.

Error is claimed as to the charge given and refused as to the second cause of action, but not as to the first cause of action.

The court in its general charge stated in a single statement applicable to both causes of action, that if the car on which the plaintiff was riding did in fact stop for the purpose of letting off passengers, at Brewster avenue, and if after the car stopped and while plaintiff was getting off of the car and before she had fully alighted, the car were started, then the defendant was negligent, and such negligence directly caused any injury to the plaintiff, she is entitled to a verdict.

The court has refused charge No. 3 asked for by the defendant, to wit, "Unless the jury find by a preponderance of the evidence introduced in the second cause of action that the plaintiff had proceeded to the back platform and was injured in the act of alighting by the negligence of the defendant, she could not recover in said second cause of action."

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The general charge of the court, while undoubtedly correct as applicable to the evidence offered by the plaintiff upon her first cause of action, was too broad as applicable to the evidence offered upon the second cause of action.

When a passenger is in the act of changing from a place or position of equilibrium on a car for a like place or position on the ground or street, for a car to be started is undoubtedly negligence as a rule of law, but even if such car is stopped for passengers to get off and passengers are changing their positions on the car, not from a car to the ground for the purpose of alighting, it is not negligence as a matter of law for the car to be moved. Negligence in such cases must be determined by the circumstances and the character of the motion of the car.

The charge given as applied unconditionally to the whole period between the stopping, if any, of the car, and the complete alighting of the plaintiff, in effect withdrew from the jury the consideration of any issue of fact, except that of whether the car stopped and then started during such period.

There was probably no error in the refusal to give the charge asked, as that would depend on the scope to be given to the word "alighting," and whether the charge was applicable to the evidence offered upon the second cause of action, but the consideration of the correctness of such charge shows error in the charge given. Under the circumstances of the case such error was manifestly prejudicial, and the motion for a new trial will be granted.

PERJURY.

[Licking Common Pleas, September Term, 1910.]

STATE OF OHIO V. ELAM TANNER.

False Testimony Given before Grand Jury must be Material to Convict Witness.

An indictment will not lie for the giving of false testimony before a grand jury, where from a reading of the indictment it is impossible to determine why or upon what ground the matter to which the defendant testified was material to the investigation which was being carried on by the grand jury.

State v. Tanner.

DEMURRER to indictment.

Phil B. Smythe, Pros. Atty., and Assist. Atty. Gen. *W. H. Miller*, for plaintiff.

J. R. Fitzgibbon, for defendant.

NICHOLAS, J.

This case is for hearing on demurrer to an indictment charging that the defendant, Elam Tanner, on August 5, of the present year, in this county and state, as a witness before the grand jury, in a matter material did corruptly and wilfully depose and declare that he did not see the mob, meaning the mob which, on July 5, of the present year, hung one Carl Etherington in said county, after the defendant had left a point on South Third street, in front of the meat market, in this city; whereas, in truth and in fact, the defendant did see said mob after he had left said point; that he saw said mob at the time they dragged said Etherington to a pole in this city and hung him upon said pole, which occurred after this defendant had left the meat market, and that the defendant well knew his testimony to be false.

It is a well-settled principle of criminal pleading in perjury that it is not sufficient to allege that the matter testified to was matter material to the issue being heard by the court or jury, but that the facts which constitute its materiality must be set out in the indictment.

This has not been done, for it is impossible for the court, in reading this indictment, to see why or upon what ground it was material in the investigation before the grand jury that this defendant should have seen this mob, either at the time he was in front of the meat market or after.

The demurrer will, therefore, be sustained.

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CRIMINAL LAW—VENUE.

[Hamilton Common Pleas, April, 1911.]

STATE OF OHIO v. GEORGE B. COX.

Positive Proof of Impossibility of Securing Fair Trial Essential to Change of Venue in Criminal Case.

A court is without jurisdiction to grant a change of venue in a criminal case except upon a finding based on positive proof of the impossibility of securing a fair trial in the county in which the offense was committed.

Henry T. Hunt, Denis F. Cash and Coleman Avery, for plaintiff.

Lawrence Maxwell, Charles W. Baker and Thos. H. Darby, for defendant.

DICKSON, J.

From the evidence offered on behalf of the defendant and not contradicted by the state, the opinion of the court is that the entries of March 31 and April 1, 1911, must be vacated and set aside and held for naught.

The accused did not have the opportunity to resist the same, and these entries, if allowed to stand, would deprive him wrongfully of his liberty without due process of law—without really any process of law.

A change of venue is to an accused person a most important right. The accused should be tried in the county where the crime was committed—in the county where his friends live. It is a right also in the state to have a change of venue, but this change of venue should never be granted except upon positive proof of the impossibility to get a fair trial.

Again, the accused if guilty should be found guilty by a hearing in the community where he has committed the alleged crime. Unless this court had found by proof that the state could not have a fair trial in this county, such an order of change of venue should not have been granted. To find by

*See also *State v. Cox*, 21 Dec. 535.

State v. Cox.

proof means there must be a hearing. No hearing was had before Judge Gorman.

It is admitted that Judge Gorman had before him only *ex parte* statements—affidavits prepared before the indictment was presented. It is admitted that the accused did not know that he had been indicted, and could not have known unless some one had violated his oath so to inform him. It is admitted that the defendant did not know there had been an application for a change of venue in his case. He was not before the court for any of these purposes. It is admitted that he did not know of the filing of the affidavits or of their contents; that he was not given opportunity to deny them.

All these proceedings had before Judge Gorman in this court were had evidently for the purpose of gaining some advantage over the accused person without due process of law.

The court finds the entries of March 31 and April 1, 1911, void, and orders that they be vacated and set aside, because they were irregularly and improperly entered.

If I have no authority to do this, I can undo it. If Mr. Hunt applies to the Supreme Court for a writ of *quo warranto*, and it be held that Judge Charles J. Hunt improperly directed me to try this case, I shall cheerfully set aside any entry which may be made by reason of this opinion. In acting as I do, I am not sitting in review on error of the findings of Judge Gorman, I simply find they were without any right and void and are as if they had never been made, because he had no jurisdiction in the premises.

Before this case comes to trial, my action can be reviewed. My right to try the case can be determined. The venue and the right of myself to try this case are most important and should be disposed of as quickly as possible and without further delay. The defendant is entitled to a fair trial—nothing more and nothing less. Until my authority to try this case be determined, and until the venue matter be determined, I hope that both the state and the accused will in the future proceed in an orderly and a lawful manner, to the end that justice shall be done in this county impartially without respect to persons.

Superior Court of Cincinnati.

DAMAGES—NEW TRIAL—SEDUCTION.

[Superior Court of Cincinnati, February 1, 1910.]

ROBERT S. SMITH V. CHRIST MUELLER.

1. New Trial Granted for Newly Discovered Evidence of Connivance of Husband in Seduction of Wife.

A new trial in an action by a husband for seduction of his wife will be granted for the purpose of giving opportunity for the introduction of newly discovered evidence bearing on the question of connivance, acquiescence or consent on the part of the husband, where it appears that the evidence in question could not with reasonable diligence have been discovered before the trial.

2. Verdict not Set Aside for Excessiveness.

A verdict of \$3,500 for the plaintiff, in an action for damages for the seduction of his wife, will not be disturbed on the ground that it is excessive.

J. S. Myers, for plaintiff.

E. Adler and J. D. Templeton, for defendant.

HOFFHEIMER, J.

This action was for damages for seduction of plaintiff's wife. Plaintiff was given a verdict for \$3,500. Several grounds are urged for a new trial.

As to the claim of excessiveness, if that is urged, I would say that courts are not known to disturb verdicts, in actions of this character, on such ground. And as for alleged misconduct of counsel for plaintiff, and other errors alleged to have occurred at the trial, in any one or in all of those there appears no substantial reason for granting a new trial.

There have been filed, however, in support of the motion for a new trial, affidavits of newly discovered evidence, which are in substance that, after the trial the sister of plaintiff's wife, one Anna Ladkin, was located at Columbus, Ohio; that said Ladkin will testify that in April, 1908, while she was at plaintiff's residence, she heard plaintiff say to her sister (his wife): "I met a good looking, rich woman today, and she is stuck on me"; that the wife rejoined, "Yes, and there is a millionaire stuck on me." That thereupon plaintiff said: "Stick with

Smith v. Mueller.

him until I get his money." That in July, 1908 (after the date when defendant and plaintiff's wife had been caught at the Race street house), said witness will testify that she heard plaintiff say to his wife, who had returned from Columbus: "Why didn't you wait until I got that money of Mueller?" (defendant).

The second statement in the affidavit appears to have been made under circumstances which would render said witness competent, although the first statement may not be. The testimony however, that is thus proposed is pertinent and material. It goes to the question of connivance, acquiescence or consent, and is of such a character as that, if the jury should so find, would compel a contrary verdict; because, as I fully charged the jury, in actions of this character the carnal knowledge or the seduction of the wife, to warrant recovery by the husband, must not have been had with the consent, connivance or acquiescence of the husband.

At the trial it was sought to show that there were some circumstances tending to prove such acquiescence, by conduct at least; and, in justice to the plaintiff, it must be said the evidence was very scant, to say the least, if indeed there was any evidence at all. But it seems to me that in view of the nature and character of the alleged newly discovered evidence which it seems, could not, with reasonable diligence, have been discovered before, substantial justice requires that the defendant be given a full and fair opportunity to bring this evidence before a jury. And I am the more constrained to believe this is the proper course, in view of the Hotel Dennison episode on the sixteenth, as related by the plaintiff and the waitress, and the depot incident that same afternoon.

The verdict is accordingly set aside and a new trial granted.

Hamilton Common Pleas.

CONTRACTS—PLEADING.

[Hamilton Common Pleas, January, 1910.]

KATE BENDER V. JOSEPH S. THOMA.**Failure to Attach Evidence of Indebtedness to Pleading Raises Presumption of Oral Execution.**

Inasmuch as Gen. Code 11333 requires that a copy of every instrument which is relied upon as evidence of indebtedness must be attached to and filed with the petition, or its absence accounted for in the petition, a court is bound to presume that the pleader will obey the law; if where no such instrument is attached, or its absence explained, so far as the pleadings are concerned a positive presumption arises that the agreement was not in writing, but was oral.

L. F. Ratterman, for plaintiff.

James R. Jordan and *Walter M. Locke*, for defendant.

DICKSON, J.

One of the motions made by the defendant in this action is that the plaintiff be required to state whether a certain contract or instrument evidencing an indebtedness was in writing or not, and if in writing that a copy thereof be attached to and filed with the petition; and if not so attached and filed, the reason for the omission be stated in the petition.

While the law is favorable to the pleader and any construction of his pleading must be liberal, there are certain rules which are required to be followed. While, also, it is true that in the modern code pleading, technical pleas are abolished, and while it is also true that now the only pleadings allowed are the petition, demurrer to the petition, answer, including cross petition, demurrer to answer, reply, and demurrer to reply; and while it is also true that the petition shall contain a statement of facts constituting the cause of action in ordinary and concise language, and the answer shall contain a general or special denial of each material allegation of the petition controverted, and also any new matter constituting a defense or counterclaim or set-off and any affirmative relief, and the reply a denial as to new matter in the answer, and any new matter not consistent

Bender v. Thoma.

with the petition, constituting an answer to the new matter in the answer, yet, the present code does not assume that the pleader shall be permitted to ignore anything and everything and rush into court and trust to luck, while the remedies on enlarged loose pleading will be discouraged.

The law requires that a copy of any instrument which is relied upon as evidence of indebtedness must be attached to and filed with the petition, or its absence be accounted for in the petition. A court is bound to presume that the pleader will obey the law, at least, when it is clear and certain, and that he will not intentionally disobey the same, and that any instrument relied upon as evidence of indebtedness will be attached or its absence explained. The fact that there has been no such instrument attached or its absence explained is, as far as the pleadings are concerned, positive presumption that the agreement was not in writing and that it was oral.

The court is of the opinion that if it appear in the pleadings that the agreement be in writing and the required copy be not attached or its absence explained, a demurrer would lie. The pleader who would not comply with the rule as to such written instruments would meet with serious difficulty in the proof in the trial of his case.

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Drumm v. Oil & Gas Co.

It is claimed by the defendant that the lease became void by failure to pay the rental due in March, 1910. On the other hand, it is claimed by counsel for the plaintiff that the lease did not become null and void until after the year ending March 17, 1911. We are cited to Archer, Law & Prac. in Oil and Gas cases page 700.

In *Rhodes v. Gas & Oil Co.* 80 Kan. 762 [104 Pac. Rep. 851], the syllabus is as follows, second paragraph:

"In the absence of terms indicating a contrary intention, a covenant in a gas and oil lease to drill a well on the leased premises within two years, or thereafter pay \$80 annually until a well is drilled, does not require the annual payments to be made in advance, and the covenant is performed by a single payment of the entire sum at any time before the end of the year for which it is made."

Our Supreme Court has held substantially the same in the case of *Gas Co. v. Eckert*, 70 Ohio St. 127 [71 N. E. Rep. 281]. The syllabus in that case reads:

"A grant to a corporation, its successors and assigns, without limitation as to time, of 'all the oil,' etc., upon the following terms: 'First. Second party agrees to drill a well upon said premises within six months from this date, or thereafter pay to the first party \$160 annually until said well is drilled, or the property hereby granted is reconveyed to the first party. Second. Second party may at any time remove all their property and reconvey the premises hereby granted, which conveyance said first party agrees to accept, and thereupon this instrument shall be null and void,' after the expiration of six months, and until a well is drilled, is a lease at an annual rental of \$160, at the option of the lessee only.'"

From the statement of facts, it appears that the company did not drill a well within the time specified in the lease.

The company paid the sum or rental stipulated by the first section of the lease in each of the years 1895, 1896, 1897 and 1898, and on July 12, 1899, tendered the amount for the year thereafter ending in that month. So that it appears that they tendered the annual rental for the fifth year shortly before the

Licking Common Pleas.

expiration of the year, in July, 1899. The landowner refused to accept it and on July 11, 1899, served notice upon the gas company that it had no further right under the lease, and that he had elected to and did terminate the lease.

On July 12, 1899, the gas company moved onto the property and undertook to erect a derrick for the purpose of drilling for oil.

The landowner then brought suit and obtained an injunction against the gas company from doing anything upon the premises. The court held that the plaintiff was not entitled to an injunction, and held that the lease was a valid and subsisting lease until the end of the year, and would continue if the lessee had paid the rentals; and as he did pay the rental, it was a subsisting and continuing contract. The circuit court held to the contrary, and the judgment of the circuit court was reversed and the cause was remanded for further proceeding.

As we understand the holding in the case—and the lease contained substantially the same provision as in the case before the court now—the Supreme Court held that the rental was due at the close of the year, and might be paid at any time before the end of the year; and there was no provision that the rental should be paid in advance.

In *Venedocia Oil & Gas Co. v. Robinson*, 71 Ohio St. 302 [73 N. E. Rep. 222; 104 Am. St. Rep. 773], the syllabus reads:

“A grant in consideration of one dollar of all the oil and gas under certain premises with the right to enter thereon for the purpose of drilling and operating for oil and gas excepting and reserving to the grantor the one-sixth part of all the oil produced and saved from said premises, to be delivered in the pipe lines with which the grantee may connect his wells, implies an engagement by the lessee to develop the premises for oil and gas.

“The time within which the implied engagement must be performed is postponed by acceptance of the sum specified in the condition of such grant that ‘in case no well is completed within ninety days from date hereof, unavoidable delay excepted, then this grant shall become null and void, unless sec-

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ond party shall pay to first parties, twenty-five cents an acre per year, payable by deposits at the ——— or directly to first party, after demand having first been made,' and does not commence to run until the end of the year for which payment is accepted, and the lease does not become null and void at the end of such year upon refusal of the grantor to accept payment for another year."

In view of these decisions by the Supreme Court, and it appearing that this was a lease stipulated for the payment of an annual rental, without stipulating that it should be paid in advance, we think that the lessee had a right to pay at any time within the year for which rentals were to be paid. The court holds that they had the whole of the second year in which to pay the rental for that year.

Whether the lease became null and void after the expiration of the last year, does not concern us now, because that question is not before the court.

We find that the plaintiff is entitled to recover the annual rental for the year ending March 17, 1911, in the sum of \$169, with interest; making a total of \$174.15. Judgment for plaintiff for \$174.15, with costs.

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Inheritance taxes are excise taxes. *State v. Bonding Co.* 609.

TELEGRAPHS AND TELEPHONES—

Telephone line operating prior to enactment of public utilities act not limited to liens constructed before passage. *Sidney Telephone Co. v. Public Service Commission*, 639.

Certificate from public utilities commission not necessary for telephone company purposing to do a private business only. *Gratiot & Brownsville Tel. Co. v. Telephone Co.* 682.

Allegation of adequacy of service of existing telephone company, traversed in answer and not supported by proof fails. *Gratiot & Brownsville Tel. Co. v. Telephone Co.* 682.

Communication over lines not connected with switch board not contempt for violation of injunction against conducting telephone business. *Gratiot & Brownsville Tel. Co. v. Telephone Co.* 682.

TIME—

Three-fourths jury provision applies to all actions begun after January 1, 1913. *Shoffstahl v. Elder*, 485.

TOLL ROADS—

Highways used as toll roads not subject to encroachment by adverse possession. *Hamilton Co. (Comrs.) v. Railway*, 426.

TORTS—

An action sounding in tort cannot be changed by amendment of the petition. *Gillett v. Pullman Co.* 334.

TOWNSHIPS—

Duties of township trustees in passing upon acceptability of ditch work are judicial and not enjoinable. *McNelly v. Clay Township*, 506.

TRADE NAMES—

Receivers justified in using trade name, adopted and used with approval of originator, by manufacturing company previous to receivership notwithstanding originator forbid receivers' use thereof, and on accounting net profits alone considered, gross profits including expenses of receivers' administration, bad debts, etc. *Star Distillery Co. v. Mihalovitch-Fletcher Co.* 342.

TRADES UNIONS—

Employees' association may enjoin employers' association from enforcing order for lockout of such employees. *Journeymen's Horse-shoers Local Union v. Protective Assn.* 338.

TRIAL—

Operation of scintilla rule distinguished in its application to motion to direct verdict and motion for new trial. *Nicholson v. Traction Co.* 151.

Jury has exclusive province in a case involving different conclusions reasonably to be reached from the evidence. *Armstrong v. Traction Co.* 215.

Phrase, "except as hereinafter stated," in will giving life estate in all of testator's property. *Blume v. Thompson*, 512.

Item cancelled and revoked by drawing lines across. *Blume v. Thompson*, 512.

"Next" as introductory phrase in item of will construed. *Blume v. Thompson*, 512.

Person interested in will at probate only can contest will. *DeBow v. Baptist Church*, 617.

WORDS AND PHRASES—

Misunderstanding between attorney and client as to filing answer not "unavoidable casualty or misfortune" justifying vacation of default judgment after term. *Illinois Nat. Supply Co. v. Whitman*, 12.

Good will considered in estimating tax valuation of newspaper. *Chew v. Grieve*, 119.

Keeping land appropriated for street on tax duplicate after auditor had notice constitutes fundamental mistake, not "error" within meaning of statute. *Christ v. Cuyahoga Co. (Comrs.)* 125.

Husband and wife "living together" though living apart pending insolvency. *Davies, In re*, 420.

Candy not perishable goods within overtime clause of female labor act. *Reinhart v. State*, 500.

Phrase, "except as hereinafter stated," in will giving life estate in all of testator's property. *Blume v. Thompson*, 512.

"Next" as introductory phrase in item of will construed. *Blume v. Thompson*, 512.

Course of employment applies to employe committing injury and injured employe. *Brown v. Manufacturing Co.* 568.

Inheritance taxes are excise taxes. *State v. Bonding Co.* 609.

WORK AND LABOR—

Blanket injunction will not be issued as scarecrow against unnamed members of labor union or against individual members, except upon hearing. *Morton v. Brotherhood of Painters*, 222.

Employes' association may enjoin employers' association from enforcing order for lockout of such employes. *Journeymen's Horse-shoers Local Union v. Protective Assn.* 338.

Ten hours' proscription against employment of female applies to candy factories. *Reinhart v. State*, 500.

Candy not perishable goods within overtime clause of female labor act. *Reinhart v. State*, 500.

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